SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 648

THE UNITED STATES OF AMERICA, PETITIONER

vs.

D. B. HELLARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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A [Caption omitted.]

1 In the United States Circuit Court of Appeals for the Tenth Circuit

No. 2703

UNITED STATES OF AMERICA, APPELLANT

vs.

D. B. HELLARD, APPELLEE

Statement of points on appeal

Filed March 6, 1943

The United States of America, appellant herein, makes the following statement of the points on which it intends to rely on appeal:

1. The trial court erred in holding that the District Court of Creek County, Oklahoma, was vested with jurisdiction to order and decree the partition and sale of the lands involved in this action, to-wit, the Southwest Quarter (SW¼) of Section Twenty-five (25), Township Eighteen (18) North, Range Ten (10) East, Creek County, Oklahoma.

2. The trial court erred in holding that the United States of America was not a necessary and indispensable party to the action instituted in the District Court of Creek County, Oklahoma, to partition the lands involved herein.

3. The trial court erred in holding that service of notice in the manner authorized by section 3 of the Act of Congress of April 12, 1926 (44 Stat. 239) of the pendency of the action instituted in the District Court of Creek County, Oklahoma, to partition the lands involved herein, was not required as a prerequisite to the jurisdiction of such court to order and decree the partition of such lands.

4. The trial court erred in not holding that the United States was not bound in the action instituted in the District Court of Creek County, Oklahoma, to partition the lands involved herein.

5. The trial court erred in holding that neither the Secretary of the Interior nor the Superintendent of the Five
2 Civilized Tribes was entitled to the control or custody of the proceeds derived from the sale in partition of the lands involved herein.

6. The trial court erred in decreeing that the plaintiff, D. B. Hellard, is the owner of the legal title in fee simple to the lands involved in this case, and that his title is valid, perfect and superior

to any right or interest of the defendants or intervener herein, and that the defendants have not right, title or interest in and to said premises.

7. The trial court erred in not decreeing that the sheriff's deed in the partition sale should be vacated and cancelled of record, that the title to the lands involved in this case should be quieted in the defendants, and that the plaintiff had no right, title or interest therein.

NORMAN M. LITTELL,
Assistant Attorney General
WHIT Y. MAUZY,
United States Attorney,
Tulsa, Oklahoma.
VERNON L. WILKINSON,
DWIGHT D. DOTY,
Attorneys, Department of Justice,
Washington, D. C.

[File endorsement omitted.]

United States Circuit Court of Appeals

Designation of contents of record on appeal

Filed March 6, 1943

The United States of America, appellant herein, makes the following designation of the record it desires to be contained in the record on appeal:

1. Transcript of record from District Court of Creek County.
2. Motion for permission of the United States to intervene.
3. Order granting the United States permission to intervene.
4. Complaint in intervention.
5. Answer and reply of plaintiff to complain in intervention.

3

6. Agreed statement of facts.
7. Findings of fact and conclusions of law.
8. Decree entered October 30, 1942.
9. Notice of appeal filed January 27, 1943.
10. Statement of points on appeal.
11. This designation.

NORMAN M. LITTELL,
Assistant Attorney General,
WHIT Y. MAUZY,
United States Attorney,
Tulsa, Oklahoma.
VERNON L. WILKINSON,
DWIGHT D. DOTY,
Attorneys, Department of Justice,
Washington, D. C.

[File endorsement omitted.]

4 In the District Court of the United States in and for the Northern District of Oklahoma

Pleas and Proceedings before The Honorable Royce H. Savage, United States District Judge in and for the Northern District of Oklahoma, presiding in the following entitled cause, to wit:

No. 64 Civil

D. B. HELLARD, PLAINTIFF

vs.

ETHLEENE FULSOM, NOW BEVENUE, ANDERSON ALLEN, OTHERWISE KNOWN AS ANDERSON CHAR-CO-TE-TEN-NA, SA-KO-TAH HAY, NEE STALEY, DESHALECOWENEY HAY, OTHERWISE KNOWN AS JOE HAY, MODIE HAY, EVA BARNETT, NEE HAY, AKD LOFA HAY, DEFENDANTS.

UNITED STATES OF AMERICA, INTERVENER

In the District Court of Creek County, State of Oklahoma

D. B. Hellard, Plaintiff, vs. Ethleene Fulsom, now Bevenue, Anderson Allen, otherwise known as Anderson Char-co-te-ten-na, Sa-Ko-tah Hay, nee Staley, Deshalecoweney Hay, otherwise known as Joe Hay, Modie Hay, Eva Barnett, nee Hay, and Lofa Hay, Defendants. No. 24431.

Petition

Filed July 5, 1941

Comes now the plaintiff, and for his cause of action against the defendants above named, alleges and states:

That the plaintiff is the owner of the fee simple title to, and is in the exclusive possession of the following described real estate and premises, situate in Creek County, Oklahoma, to wit:

The Southwest Quarter (SW4) of Section Twenty-five (25), Township Eighteen (18) North, range Ten (10) East;

5 That the plaintiff acquired his title to said lands in the following manner;

That Polly Char-coten-na was a full-blood member of the Creek or Muskogee Tribe of Indians, duly enrolled as such opposite Roll Number 6892 of the approved rolls of said Tribe, and that the premises above described were allotted to her, the said Polly

Char-co-ten-na, as her distributive share of the lands of said Tribe; that homestead patent for allotment deed covering said lands were duly executed and delivered to her, the said Polly Char-co-te-ten-na in the manner provided by law; that said deeds are duly recorded in the office of the County Clerk of Creek County, Oklahoma, in patent record 2, at page 629, and patent record 5, at page 211, respectively, to which record reference is hereby made, and the same are hereby made a part of this petition, as though herein set forth, pro forma.

That the said Polly Char-co-te-ten-na died intestate on the 5th day of January, 1938, and was seized and possessed of said lands at the date of her death, and that she, the said Polly Char-co-te-ten-na left surviving as her sold and only heirs the following named persons: John Hay, a son: Anderson Allen, otherwise known as Anderson Char-co-te-ten-na, a grand-son; and Ethleene Fulsom, now Bevenue, a great grand-daughter, and that such land descended to them under the laws of the State of Oklahoma in equal shares. That the said John Hay was a full-blood member of the Creek or Muskogee Tribe of Indians, duly enrolled as such opposite roll number 6895 of the approved rolls of said Tribe of Indians, and the defendant, Anderson Allen, and Ethleene Fulsom, now Bevenue, are each un-enrolled full-blood members of the said Tribe of Indians.

That the said John Hay died intestate on the 26th day of March, 1928, and was at the date of his death seized and possessed of the interest in said lands so inherited by him from the said Polly Char-co-te-ten-na as above set forth; that the said John Hay left suriviving as his sole and only heirs the following persons:

Sa-ko-tah Hay, nee Staley, the surviving widow; Deshale-
6 coweney Hay, and Modie Hay; Eva Barnett, nee Hay and Lofa Hay, surviving children. That Sa-Ko-tah Hay, nee Staley, Deshalecoweney Hay and Modie Hay are each enrolled full-blood members of the Creek Tribe of Indians, enrolled opposite Roll numbers 1910, 6897 and N. B. 85C, respectively, upon the approved rolls of such Tribe, and that Eva Barnet, nee Hay, and Lofa Hay, are each enrolled full-blooc members of said Tribe of Indians.

Plaintiff says that on the 8th day of October 1940, Lew Wilder, the duly qualified and acting Sheriff of Creek County, Oklahoma, pursuant to the orders and judgments of the District Court of Creek County, Oklahoma, made and entered in cause number 25920, of the causes pending in said court, and entitled Ethleene Fulsom, now Bevenue, and others, plaintiff v. Anderson Allen, or Char-co-te-ten-na, and others, defendants, made, executed and delivered to this plaintiff his certain sheriff's deed in partition,

thereby vesting the plaintiff with the fee simple title to said lands. That said deed was duly filed of record in the office of the County Clerk of Creek County, Oklahoma, on the 12th day of October 1940, and recorded in book 473, at page 112, of the records in said office. A true and correct copy of said deed is hereto attached, marked Exhibit "A," and is made a part hereof as though set forth pro forma.

That the defendants above named claim some right, title or interest in and to said real estate and premises, the exact nature of which claims is to plaintiff unknown, but the same constitutes a cloud upon plaintiff's title to said lands.

Wherefore, plaintiff prays that he have judgment against said defendants adjudging that plaintiff is the owner of the legal title in fee simple in and to the above described lands, free and clear of any claim on the part of the defendants herein, and adjudging that the defendants have no right, title or interest therein; and that the defendants, and each of them, be restrained and enjointed from claiming or asserting any right, claim or interest therein, and that the title of plaintiff be quieted and confirmed; and that plaintiff have all other and further relief, legal or equitable, to which he may be entitled in the premises, and for his costs herein.

GEORGE H. JENNINGS,
Attorney for Plaintiff.

Exhibit A to Petition

311-724 File No. 47724

Sheriff's Deed Under Partition Sale

This Indenture, made this 8th day of October, 1940, by and between Lew Wilder, as Sheriff of Creek County, in the State of Oklahoma, party of the first part, and D. B. Hellard, party of the second part.

Witnesseth: That Whereas, by virtue of an alias order of sale issued on the 28th day of August 1940, by the District Court within and for Creek County, State of Oklahoma, in Cause No. 23920, in which Ethleene Fulsom now Bevenue, et al., were plaintiffs, and Anderson Allen, et al., were defendants, commanding said Sheriff to sell the real estate and premises, involved in said action and hereinafter described, at public auction, to the highest bidder, after giving notice of the time and place of said sale according to law, to satisfy a judgment made and entered in said cause on the 24th day of June 1940, for the partition of the following described real estate, situated in Creek County, State of Oklahoma, to wit:

Southwest Quarter of Section 25, Township 18 North, Range 10 East,

among the several owners thereof, as set out in said judgment, and

Whereas, said Sheriff thereupon advertised said property for sale by giving due and legal notice of the time and place of said sale and the description of the property to be sold, by advertising the same in The Democrat News, a newspaper of general circulation and printed and published in Creek County, Oklahoma, once a week for more than thirty days prior to the day of sale, which was the 30th day of September 1940, and

8 Whereas, on the 30th day of September 1940, pursuant to said Notice of Sale, said Sheriff did offer said property for sale at public auction at the North front door of the Court House in the City of Sapulpa, Creek County, Oklahoma, at the hour of ten o'clock A. M. at which sale said real estate, was sold and struck off to the said D. B. Hellard, party of the second part, for the sum of $1,500.00, he being the highest bidder and that being the highest sum bid and being more than two-thirds of the appraised value thereof.

Whereas, said Sheriff having made return of said order of sale into court on the 2nd day of October 1940, with his proceedings thereunder duly certified and endorsed thereon, and the said Court having examined said proceedings and being satisfied that said sale was made in all respects in conformity with the law and said alias order of said did on the 7th day of October 1940, confirm and approve said sale and directed said Sheriff to make and execute to said purchaser, D. B. Hellard, party of the second part, a good and sufficient deed to all of said property so sold.

Now, Therefore, the Sheriff of Creek County, Oklahoma, aforesaid party of the first part, by virtue of said alias order of sale and in pursuance of the Statutes in such case made and provided, and for and in consideration of the sum above mentioned to him in hand paid by D. B. Hellard, party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, sold and confirmed and by these presents doth, grant, bargain, sell, convey, and confirm unto said party of the second part, his heirs and assigns, all of the estate, right, title and interest which each, every and all of the parties to said action hereinabove described and in particular Ethleene Fulsom now Bevenue, Deshalecoweneÿ (Joe) Hay, Modie Hay, Eva Hay now Barnett, Lofa Hay, Anderson Allen and Sacota Had had at the commencement of said action, or at any time thereafter had, or now have, in and to the following described real estate and premises, situate in Creek County, State of Oklahoma, to wit:

9 Southwest Quarter of Section 25, Township 18 North, Range 10 East,

together with all and singular the tenements, improvements, hereditaments and appurtenances thereon and thereunto belonging or in any wise appertaining.

To have and to hold the said real estate and premises together with the appurtenances thereunto said party of the second part his heirs and assigns, forever, as fully and absolutely as he, the Sheriff aforesaid, can, may or ought to by virtue of the said alias order of sale, confirming said sale, and the statutes in such case made and provided, grant, bargain, sell, convey, and confirm the same.

In witness whereof, the party of the first part, the Sheriff of Creek County, Oklahoma, has hereunto set his hand and seal the day and year first above written.

[SHERIFF'S SEAL] LEW WILDER.
Sheriff of Creek County, Oklahoma.

Revenue Stamps $1.65 cancelled.

[Verification omitted.]

Filed for record in office of County Clerk, Creek County, Oklahoma, October 12, 1940, at 3:30 P. M. and recorded in Book 473, Page 112.

[File endorsement omitted.]

Statement re notice, summons, and order extending time

[Plaintiff's notice to the Superintendent of the Five Civilized Tribes, with Marshal's return, was filed July 9, 1941. A summons, with Sheriff's return, was filed July 10, 1941. On July 16, 1941, an order was entered granting the United States of America thirty days from July 23, 1941, within which to plead. Alias summons, with Sheriff's return, was filed August 4, 1941.]

10 In District Court of Creek County

General appearance and waiver of summons

Filed Aug. 19, 1941

Comes now the defendant, Lofa Hay, waives the issuance and service of summons in the above numbered and entitled cause, and enters his general appearance herein, and such defendant hereby appoints and designates James J. Mapes, attorney at law, Sapulpa, Oklahoma, and M. S. Robertson, U. S. Probate Attorney, as his true and lawful attorneys at law to represent him in the above numbered and styled cause, being absent from Oklahoma engaged in Indian School work in State of New Mexico.

LOFA HAY.

Subscribed and Sworn to before me at Albuquerque, New Mexico, this 11th day of August 1941. Isabell Benton, Notary Public. My Commission expires 26 day of January 1943. (Seal.)

[File endorsement omitted.]

In District Court of Creek County

Answer of defendants

Filed Aug. 19, 1941

Come now Ethleene Fulsom now Bevenue, Deshalecoweney (Joe) Hay, Modie Hay, Eva Barnett, nee Hay, and Lofa Hay, and for their answer to the petition of D. B. Hellard filed against them as defendants herein, state and aver:

That heretofore in Partition suit No. 23920, filed and prosecuted by them as plaintiffs against SaKcota Hay, nee Staley, and Anderson Allen or Charcotetenna as defendants therein, and co-defendants herein, said suit having been determined and settled in this court and partition made under proper orders of this court and sale as directed made and deed issued, executed and delivered under order of this court by the former Sheriff of Creek County, Oklahoma, conveying to the plaintiff the land in question in this action, to wit:

the SW 4 of section 25, Twp. 18 N. Rg. 19 E.

These answering defendants aver that the Court at their instance sold all their interest, right, and title to said tract
11 of land and therefore they claim no interest, right, or title to said land as against the plaintiff or any of the parties to said action they all having been declared and adjudged to be the heirs of Polly Charcotetenna, deceased, the allottee and owner of said land. Wherefore defendants pray the court that they may go hence without costs in this action.

JAMES J. MARS,
Attorney for above named defendants.
M. S. ROBERTSON,
U. S. Probate Attorney.

[File endorsement omitted.]

Statement as to summons and order extending time

[A summons, with Sheriff's return, filed August 23, 1941. On August 27, 1941, an order was entered granting the United States of America fifteen days additional time within which to plead.]

In District Court of Creek County

Petition for removal of cause to the United States District Court for the Northern District of Oklahoma

Comes now the United States of America, by Whit Y. Mauzy, United States Attorney for the Northern District of Oklahoma, acting under the direction of the Attorney General of the United States and at the request of the Secretary of the Interior of the United States, and in its own behalf and in behalf of the restricted Creek Indians concerned therein for cause of action alleges and states:

I

That your petitioner was served with notice and certified copy of the pleadings in this cause of action on July 8, 1941, under the provisions of the Act of Congress of April 12, 1926, which was an Act amending an Act of Congress of May 27, 1908, concerning suits involving Indian lands and providing for the United States to join in certain actions for the purpose of making
12 judgments binding on the United States of America, and this petitioner, United States of America, states that it is an interested party in this cause of action for the reason that the petition filed in this court shows that the controversy involves title to certain lands in Creek County heretofore allotted to one Polly Charcotetenña, a full-blood Creek Indian appearing opposite Roll No. 6892.

II

Your petitioner further shows to the court that under the provisions of the Act of Congress of April 12, 1926, the United States of America, in causes of this nature when served with notice and certified copy of all pleadings filed in this court, may, within twenty (20) days after service having been made on the Superintendent of the Five Civilized Tribes, or within such extended time as the trial court, in its discretion, may permit, is given the right to remove such cause pending in the State Court to the United States District Court for such District by filing in such suit in the State Court a petition for removal thereof to the United States District Court in the District where such suit is pending; that under the provisions of said Act of Congress it shall then be the duty of the State Court to accept such petition and proceed no further in said cause.

III

Your petitioner further shows to the court that this petition was filed within the time required by said Act of Congress and because the United States of America has jurisdiction and con-

trol over the property of the restricted Indians of the Five Civilized Tribes and for the reason that the parties to this cause of action are restricted Creek Indians, your petitioner is an interested and necessary party in the final determination of the issues in this cause of action, and that said service of summons and the certified copy of the pleadings on the Superintendent of the Five Civilized Tribes as hereinabove set out requires that the United States of America enter its appearance herein for the purpose of removing this cause to the United States District Court for the Northern District of Oklahoma, that said cause may there
13 proceed with the United States of America as an interested and necessary party herein.

IV

That the notice and certified copy of the pleadings served on the Superintendent of the Five Civilized Tribes at Muskogee, Oklahoma, are hereto attached and made a part of the petition for removal as required by said Act of Congress.

Wherefore, your petitioner prays that pursuant to the Act of Congress of April 12, 1926, and the service had on the Superintendent of the Five Civilized Tribes, this cause of action commenced in the District Court of Creek County, Oklahoma, be removed therefrom to the United States District Court for the Northern District of Oklahoma and there proceeded with as a cause originally commenced in that court.

WHIT Y. MAUZY,
United States Attorney.

[Verification omitted.]

Statement as to notice of hearing on petition for removal

[A notice to counsel for plaintiff of hearing on petition for removal, with acknowledgment of service, was filed August 27, 1941.]

In District Court of Creek County

Order of removal and directing clerk of State court to certify record

Filed Aug. 27, 1941

Now on this 27th day of August 1941, this cause coming on before the Honorable C. O. Beavers, Judge of the District Court of Creek County, Oklahoma, on petition of the United States of

America filed herein under and by authority of the Act of Congress of April 12, 1926, upon proper service in causes of this nature mentioned in said Act, said cause may be removed to the United States District Court.

And it further appearing to the Court that this is a cause in which the Superintendent of the Five Civilized Tribes at
14 Muskogee, Oklahoma, has been duly and properly served with notice and a certified copy of the pleadings in this cause as provided by said Act of Congress, and it further appearing to the Court that the controversy herein involves title to certain lands allotted to Polly Charcotetenna, a full-blood Creek Indian appearing opposite Roll No. 6892, and that the United States of America is a proper and necessary party in causes of this nature that come under said Act of Congress, and that the United States District Court for the Northern District of Oklahoma has jurisdiction of the controversy arising between the parties herein for the reason that there is an Act of Congress involved in the determination of the issues in said cause.

It is, therefore, on motion of the counsel for the United States of America as provided for in said Act of Congress, and proper petition filed herein, ordered that said petition be and the same is hereby accepted and approved.

It is the further order of the court that the clerk of this court is hereby directed to make and certify the record in this cause for transmission to the United States District Court for the Northern District of Oklahoma.

C. O. BEAVER,
District Judge,
Creek County, Oklahoma.

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

16 In United States District Court, Northern District of Oklahoma

Motion for permission to intervene

Filed Oct. 6, 1941

Comes now the United States of America by Whit Y. Mauzy, United States Attorney for the Northern District of Oklahoma and Chester A. Brewer, Assistant United States Attorney for said District, and moves the court for an order permitting the United States to intervene in the above entitled cause of action and for grounds of said motion, states:

I

That this is an action involving lands allotted to a full-blood Creek Indian. That the United States has been served with Notice and copies of the pleadings in this cause filed in the District Court of *of* Creek County, Oklahoma, pursuant to the provisions of the Act of Congress of April 12, 1926.

II

That the plaintiff in his petition seeks a decree quieting title to lands allotted to a full-blood Creek Indian.

WHIT Y. MAUZY,
United States Attorney,
CHESTER A. BREWER,
Assistant United States Attorney,
Attorneys for Intervener,
335 Federal Building, Tulsa, Oklahoma.

[File endorsement omitted.]

Copies mailed to Attorneys of record this 6th day of October, 1941.

CHESTER A. BREWER.

In United States District Court

Order granting leave to intervene

Filed Oct. 6, 1941

Now on this 6th day of October, 1941, this matter coming on before the court upon the motion of the United States of America for permission to intervene in this cause of action and it appearing to the court that this action involves lands allotted to
17 a restricted Creek Indian and that the United States of America should be a party to this action,

It is therefore the order of this court that the United States of America be and it hereby is granted permission to intervene in this cause of action.

F. E. KENNAMER, *Judge.*

O. K. As To Form: Service Of Copy Acknowledged:

WHIT Y. MAUZY,
United States Attorney.
CHESTER A. BREWER,
Assistant United States Attorney.

Copies mail' to Attorneys of record this 6th day of October 1941.

CHESTER A. BREWER.

[File endorsement omitted.]

In United States District Court

Complaint in intervention

Filed Dec. 1, 1941

Comes now the United States of America by Whit Y. Mauzy, United States Attorney for the Northern District of Oklahoma and Chester A. Brewer, Assistant United States Attorney for said District, and for its complaint in intervention in this cause of action alleges and states that this intervener appears herein in its own behalf and in behalf of Ethleene Fulsom now Bevenue, Anderson Allen, otherwise known as Anderson Char-co-te-ten-na, Sako-tah Hay, nee Staley, Deshalecoweney Hay, otherwise known as Joe Hay, Modie Hay, Eva Barnett, nee Hay, and Lofa Hay, restricted Creek Indians, and for complaint in intervention states:

I.

That the United States of America was served with Notice and copies of all pleadings on file in the District Court of Creek County, Oklahoma, in the above cause of action by service of the same on the superintendent of the Five Civilized Tribes under the provisions of the Act of Congress of April 12, 1926 (44 Stat. 239), and this intervener entered its appearance in said cause of
18 action in the District Court of Creek County, Oklahoma, and removed said cause to this court.

II.

This intervener further alleges that the land involved in this cause of action was duly allotted to Polly Char-co-ten-na, a full-blood Creek Indian appearing opposite Roll No. 6892, who died intestate on the 5th day of January 1938, seized and possessed of the land hereinafter described:

The Southwest Quarter (SW¼) of Section Twenty-five (25), Township Eighteen (18) North, Range Ten (10) East, Creek County, Oklahoma.

III.

That at the time of the death of Polly Char-co-ten-na, full-blood Creek Indian appearing opposite Roll No. 6892, she left as her sole and only heirs at law the following persons:

John Hay, son, Anderson Allen, otherwise known as Anderson Char-co-te-ten-na, grandson, Ethleene Fulson, now Bevenue, granddaughter,

and that the land above described descended to them under the laws of descent and distribution of the State of Oklahoma in equal shares. That each of said Indians above named were restricted Creek Indians.

IV.

That John Hay, full-blood Creek Indian appearing opposite Roll No. 6895, died intestate on March 16, 1938, and at the date of his death was seized and possessed of an undivided one-third interest in the above described land. That the said John Hay left surviving him as his only heirs at law the following persons:

Sa-ko-tah Hay, nee Staley, surviving widow, Dashalecoweney Hay, child, Modie Hay, child, Eva Barnett, nee Hay, child, and Lofa Hay, child.

V.

Intervener further alleges that suit was instituted in the District Court of Creek County, Oklahoma, entitled Ethleene Fulsom, now Bevenue et al., v. Anderson Allen et al., No. 25920; that
19 judgment was entered in said proceedings and a Sheriff's deed issued in partition by the then Sheriff of Creek County, Oklahoma. That said judgment and the proceedings thereunder and the Sheriff's deed in partition issued therein are void and of no force and effect and said Sheriff's deed should be by decree of this court cancelled and vacated of record and the title to the above described land should be quieted in Ethleene Fulsom, now Bevenue, Anderson Allen, otherwise known as Anderson Char-co-te-ten-na, Sa-ko-tah Hay, nee Staley, Deshalecoweney Hay, otherwise known as Joe Hay, Modie Hay, Eva Barnett, nee Hay, and Lofa Hay, for the reason that the State Court was without jurisdiction of said action because of the absence of the United States of America as a necessary and indispensable party, and for the further reason that service was not had on the Superintendent of the Five Civilized Tribes pursuant to the provisions of Section 3 of the Act of Congress of April 12, 1926.

Wherefore, this intervener demands that the Sheriff's deed in partition sale dated October 18, 1940, from Lew Wilder Sheriff of Creek County, Oklahoma, to D. B. Hellard, which deed was filed of record in the office of the County Clerk of Creek County, Oklahoma, on October 12, 1940, and recorded in Book 473, at Page 112, to be vacated and cancelled of record and that the title to the Southwest Quarter (SW¼) of Section 25, Township 18 North,

Range 10 East, Creek County, Oklahoma, be quieted in Ethleene Fulsom, now Bevenue, Anderson Allen, otherwise known as Anderson Char-co-te-ten-na, Sa-ko-tah Hay, nee Staley, Deshalecoweney Hay, otherwise known as Joe Hay, Modie Hay, Eva Barnett, nee Hay, and Lofa Hay, and that the plaintiff D. B. Hellard be decreed to own no right, title, or interest in or to the above described land, and that said plaintiff be restrained and enjoined from claiming or asserting any right, title, or interest in or to said land, and that this intervener recover his costs herein.

WHIT Y. MAUZY,
United States Attorney,
CHESTER A. BREWER,
Assistant United States Attorney,
Attorneys for Intervener,
335 Federal Building, Tulsa, Oklahoma.

Copies mailed Attorneys of record this 1st day of December 1941.

CHESTER A. BREWER.

[File endorsement omitted.]

In United States District Court

Answer and reply of plaintiff to complaint in intervention

Filed Dec. 19, 1941

Comes now the plaintiff, and for answer and reply to the complaint in intervention filed in the above numbered and styled cause by the United States of America, alleges and says:

I.

That he admits the allegations of numerical Paragraphs I, II, III, and IV of such complaint of intervention.

II.

For further answer, plaintiff admits the allegations of numerical Paragraph V of such complaint in intervention, except the allegation that the judgment rendered in said cause 25,920 of the causes pending in the District Court of Creek County, Oklahoma, and the Sheriff's deed issued therein are void and of no force and effect, and in this connection plaintiff alleges and says that the United States of America was not a necessary and indispensable party thereto, and further says that no notice was required to be given to the Superintendent of the Five Civilized Tribes of the pendency of said action pursuant to the provisions of Section 3 of the Act of Congress of April 12, 1926 (44 Stat. 239), and your

plaintiff alleges and says that the District Court of Creek County, Oklahoma, was vested with jurisdiction to hear and determine said action under the provisions of Section II of the Act of Congress of June 14, 1918 (40 Stat. 606), and plaintiff says that the judgment rendered in said cause is a valid and binding adjudication and the deed issued pursuant thereto vested the fee simple title in said premises in this plaintiff.

Wherefore, having fully answered, plaintiff prays for
21 judgment in accordance with the prayer of his petition herein.

GEORGE H. JENNINGS,
Attorney for Plaintiff,
Sapulpa, Oklahoma.

I hereby certify that I served true copies of the above answer upon *Council* for all other parties.

GEORGE H. JENNINGS.

[File endorsement omitted.]

In United States District Court

Agreed statement of facts

Filed Sept. 17, 1942

It is Hereby Stipulated and Agreed by and between the plaintiff, acting through his attorney of record, George H. Jennings, and the United States of America, by Whit Y. Mauzy, United States District Attorney for the Northern District of Oklahoma, acting under the direction of the Attorney General of the United States in behalf of the United States, and in behalf of the restricted Creek Indians, defendants herein, that the following statement of facts shall govern the determination of all issues in this case:

I

That this action was instituted in the District Court of Creek County, Oklahoma, and notice of the pendency thereof was given to the Superintendent of the Five Civilized Tribes in the time and in the manner provided by the Act of Congress of April 12, 1926 (44 Stat. 239), and that the United States of America removed said cause to this court in conformity with the provisions of such Act of Congress.

II

That Polly Char-co-ten-na was a full-blood member of the Creek or Muskogee Tribe of Indians duly enrolled as such opposite

Roll Number 6892, and that the lands involved in this action were duly allotted to her, the said Polly Char-co-ten-na, as her distributive share of the lands of said Tribe; that allotment deed and homestead patent covering said lands were duly issued to her, the said Polly Char-co-ten-na, in the manner provided by law.

III

That on December 27, 1928, the said Polly Char-co-ten-na executed a Certificate of Tax Exemption selecting all of the lands involved in this action as tax exempt pursuant to the provisions of the Act of Congress of April 10, 1928 (45 Stat. 495); that said Certificate was approved by the Secretary of the Interior on January 14, 1930, and was recorded in the office of County Clerk of Creek County, State of Oklahoma, on the 30th day of April 1930.

IV

That the said Polly Char-co-ten-na died intestate on the 5th day of January 1938, and was at the time of her death a resident and citizen of Creek County, Oklahoma, and was seized and possessed of the above lands.

That she, the said Polly Char-co-ten-na, left surviving as her sole and only heirs the following named persons: John Hay, a son; Anderson Allen, or Char-co-ta-ten-na a grandson, and Ethleene Fulsom, now Bevenue, a great grand-daughter, and that such lands descended to them under the laws of the State of Oklahoma in equal shares. That the said John Hay was a full-blood member of the Creek or Muskogee Tribe of Indians duly enrolled as such opposite Roll Number 6895 on the approved Rolls of said Tribe, and the said Anderson Allen and Ethleene Fulsom, now Bevenue, are each *unenrolled* full-blood members of said Creek Muskogee Tribe of Indians.

That John Hay died intestate on the 28th day of March 1928, and was at the time of his death a resident of Creek County, Oklahoma, and was vested and possessed of the interest in the lands involved in this action which was so inherited by him from the said Polly Char-co-ten-na, as aforesaid, and that the said John Hay left surviving as his sole and only heirs the following persons:

Sa-ko-tah Hay, nee Staley, his surviving widow; Deshalecoweney Hay, a son; Modie Hay, a son; Eva Barnett, now Hay, a daughter; Lofa Hay, a son.

That Sa-ko-tah Hay, nee Staley, Deshalecoweney Hay and Modie Hay are each full-blood Indians, duly enrolled as such opposite Roll Number 1910, 6897, and NB 850, respectively,
23 upon the approved rolls of said Tribe, and that Eva Barnett, nee Hay, and Lofa Hay are each unenrolled full-blood, members of said Tribe.

V

That on the 20th day of March 1940, Ethleene Fulsom, nee Bevenue, Deshalecoweney Hay, Modie Hay, Eva Barnett, nee Hay and Lofa Hay instituted an action in the District Court of Creek County, State of Oklahoma, against Anderson Allen, or Char-co-te-ten-na, and Sa-ko-tah Hay, nee Staley, seeking the partition of the lands involved in this action; which case was docketed under cause number 23920 of the causes pending in said court; that service of summons was had upon the defendants named in said action in the manner provided by the laws of the State of Oklahoma; that thereafter and on the 24th day of June 1940, a judgment was entered in said cause directing the partition of the lands involved therein, and herein involved; and that pursuant to said judgment said lands were sold to D. B. Hellard, plaintiff herein, and said sale was duly confirmed by the District Court of Creek County, State of Oklahoma. That no appeal was had from such judgment, and pursuant thereto a sheriff's deed in partition was executed to the said D. B. Hellard by the Sheriff of Creek County, State of Oklahoma. That a true copy of said sheriff's petition herein, as Exhibit "A" thereto.

That the proceedings had in such cause were in strict conformity to the statutes of the State of Oklahoma providing for the partition of real estate, and that the United States was not named as a party defendant in said action, nor was the United States served with process, and notice of the pendency of said partition suit was not given or served upon the Superintendent of the Five Civilized Tribes in the manner provided by Section 3, of the Act of Congress of April 12, 1926 (44 Stat. 239).

Dated this — day of September 1942.

GEORGE H. JENNINGS,
Attorney for Plaintiff.
WHIT Y. MAUZY,
United States Attorney.

[File endorsement omitted.]

24 In United States District Court

Findings of fact and conclusions of law

Filed Oct. 30, 1942

This cause having come on for hearing on an agreed statement of facts filed herein by the plaintiff, defendants and intervener, and the Court being fully advised in the premises, finds:

Findings of fact

The court finds the facts in this case to be as shown by the agreed statement of facts filed herein, and as follows:

I

That this action was instituted in the District Court of Creek County, Oklahoma, by the plaintiff, D. B. Hellard, against the defendants above named to quiet title to the following described premises, situate in said county, to wit:

The Southwest Quarter (SW4) of Section Twenty-five (25), Township Eighteen (18) North, Range Ten (10) East;

Written notice of the pendency of this action was given to the Superintendent of the Five Civilized Tribes in the manner provided by Section 3 of the Act of Congress of April 12, 1926, 44 Stat. 239, and this cause was duly removed to this Court by the United States of America in conformity with the provisions of such Act of Congress.

II

That Polly Char-co-te-ten-na was a full-blood member of the Creek or Muskogee Tribe of Indians duly enrolled as such opposite Roll Number 6892, and the lands involved in this action were duly allotted to her, the said Polly Char-co-te-ten-na, as her distributive share of the lands of said Tribe; that allotment deed and homestead patent covering said lands were duly issued to her, the said Polly Char-co-te-ten-na, in the manner provided by law.

III

That on December 27, 1928, the said Polly Char-co-te-ten-na executed a Certificate of Tax Exemption selecting the lands involved in this action as tax exempt pursuant to the provi-
25 sions of the Act of Congress of April 10, 1928 (45 Stat. 495); that said Certificate was approved by the Secretary of the Interior on January 14, 1930, and was recorded in the office of County Clerk of Creek County, State of Oklahoma, on the 30th day of April 1930.

IV

That the said Polly Char-co-te-ten-na died intestate on the 5th day of January 1938, and was at the time of her death a resident and citizen of Creek County, Oklahoma, and was seized and possessed of the above lands.

That the said Polly Char-co-te-ten-na, left surviving as her sole and only heirs the following named persons: John Hay, a son; Anderson Allen, or Char-co-te-ten-na, a grandson; and Ethleene Fulsom, now Bevenue, a great granddaughter, and that such lands descended to them under the laws of the State of Oklahoma in equal shares. That the said John Hay was a full-blood member of the Creek or Muskogee Tribe of Indians duly enrolled as such opposite Roll Number 6895 on the approved Rolls of said Tribe, and the said Anderson Allen and Ethleene Fulsom, now Bevenue, are each unenrolled full-blood members of said Creek or Muskogee Tribe of Indians.

That John Hay died intestate on the 28th day of March 1928, and was at the time of his death a resident of Creek County, Oklahoma, and was vested and possessed of the interest in the lands involved in this action which was so inherited by him from the said Polly Char-co-te-ten-na, as aforesaid, and that the said John Hay left surviving as his sole and only heirs the following persons:

Sa-ko-tah Hay, nee Staley, his surviving widow; Deshalecoweeney Hay, a son; Modie Hay, a son; Eva Barnett, now Hay a daughter; Lofa Hay, a son;

That Sa-ko-tah Hay, nee Staley, Deshalecoweney Hay and Modie Hay are each full-blood Indians, duly enrolled as such opposite Roll Number 1910, 6897, and NB 850, respectively, upon the approved rolls of said Tribe, and that Eva Barnett, nee Hay, and Lofa Hay are each unenrolled full-blood members of said Tribe.

26 V.

That on the 20th day of March 1940, Ethleene Fulsom, nee Bevenue, Deshalecoweney Hay, Modie Hay, Eva Barnett, nee Hay and Lofa Hay instituted an action in the District Court of Creek County, State of Oklahoma, against Anderson Allen, or Char-co-te-ten-na, and Sa-ko-tah Hay, nee Staley, seeking the partition of the lands involved in this action; which case was docketed under cause number 23920 of the causes pending in said court; that service of summons was had upon the defendants named in said action in the manner provided by the laws of the State of Oklahoma; that hereafter and on the 24th day of June

1940, a judgment was entered in said cause directing the partition of the lands involved therein, and herein involved; and that pursuant to said judgment said lands were sold to D. B. Hellard, plaintiff herein, and said sale was duly confirmed by the District Court of Creek County, State of Oklahoma. That no appeal was had from such judgment, and pursuant thereto a sheriff's deed in partition was executed to the said D. B. Hellard by the Sheriff of Creek County, State of Oklahoma.

That the proceedings had in such cause were in strict conformity to the statutes of the State of Oklahoma providing for the partition of real estate, and that the United States was not named as a party defendant in said action, nor was the United States served with process, and notice of the pendency of said partition suit was not given or served upon the Superintendent of the Five Civilized Tribes in the manner provided by Section 3 of the Act of Congress of April 12, 1926 (44 Stat. 239).

Conclusions of law

The court concludes as a matter of law:

I.

That the District Court of Creek County, Oklahoma, was vested with jurisdiction to order and decree the partition and sale of the lands involved in this action by virtue of the provisions of Section 2 of the Act of Congress of June 14, 1918
27 (40 Stat. 606) United States vs. Bond, C. C. A. 10, 108 Fed. (2) 504; United States vs. Watashe, C. C. A. 10, 117 Fed. (2) 947.

II

That the United States of America was not a necessary and indispensable party to the action so instituted in the District Court of Creek County, Oklahoma, to partition the lands involved herein and service of notice in the manner authorized by Section 3 of the Act of Congress of April 12, 1926 (44 Stat. 239), was not required as a prerequisite to the jurisdiction of such court to order and decree the partition of such lands.

III

That no provision was made by Congress in the Act of June 14, 1918, supra, or any other Congressional enactment for making the United States of America a party to an action in State Court to partition lands acquired by inheritance or devise by restricted members of the Five Civilized Tribes, and no authority existed

for giving notice to the United States of America of the pendency of such an action prior to the passage of the Act of April 12, 1926, supra. To determine that the United States of America is a necessary and indispensable party to such an action is in effect to hold that Section 2 of the Act of June 14, 1918, supra, was wholly without force and effect until the passage of the Act of April 12, 1926, for the reason that the United States cannot be made a party to any action or proceeding in the absence of its consent (Minnesota vs. United States, 305 U. S. 382, 83 L. ed. 236). The act in question should not be given a construction which would lead to such an absurd and futile result (United States vs. American Trucking Association, 310 U. S. 534, 84 L. ed. 1345).

IV

That neither the Secretary of the Interior, nor the Superintendent of the Five Civilized Tribes are vested with the custody and control of proceeds derived from the voluntary alienation or partition of lands acquired by inheritance or devise by restricted members of the Five Civilized Tribes, but on the
28 contrary, all restrictions upon such proceeds have been removed by the applicable Acts of Congress.

Section 9 of the Act of Congress of May 27, 1908 (35 Stat. 312), as amended by Section 1 of the Act of Congress of April 12, 1926 (44 Stat. 239), provides in part:

"The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by Section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the County Court having jurisdiction of the settlement of the estate of the deceased allottee or testator: * * *"

The purpose of the requirement for approval by the County Court is to safeguard the interest of the full-blood heir; to see that he shall not be wronged by any sale he might desire to make; that the consideration shall be ample; and that he shall, in fact, receive it (Lykins vs. McGrath, 184 U. S. 169; 46 L. ed. 485; Harris vs. Bell, 254 U. S. 103; 65 L. ed. 159, Kiker vs. United States, C. C. A. 10, 63 Fed. (2) 937).

This statute was amended by Section 8 of the Act of January 27, 1933 (44 Stat. 777), to provide for the approval of conveyances by full-blood heirs and devisees of such Tribes to be had in open Court, after notice by publication, and to the United States

Probate Attorney, in the manner provided by the Rules of procedure in Probate matters, adopted by the Supreme Court of Oklahoma in June of 1914.

Rule 10 of the Rules of procedure in probate matters, adopted by the Supreme Court of Oklahoma in June of 1914, in addition to providing procedure for the approval of such conveyances, provides as follows:

"When it shall appear for the best interests of the Indian, approval will be withheld unless the grantor agree, in writing, for the deposit of the proceeds derived from the sale of the land to be expended subject to the approval of the County Court."

29 And Section 2 of the Act of June 14, 1918, provides, in part:

"Any land allotted in such proceedings to a full blooded Indian or conveyed to him upon his election to take the same at the appraisement shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character."

The above quoted Statutory enactments negative any claim that either the Secretary of the Interior or the Superintendent of the Five Civilized Tribes are entitled to the control or custody of the proceeds to be derived either from the voluntary alienation or the sale in partition of the lands acquired by inheritance or devise by restricted members of the Five Civilized Tribes.

V

That the case of Minnesota vs. United States, 305 U. S. 382, 83 L. ed. 236, is not controlling in the determination of the questions presented in this case, for the following reasons:

A. The Act of June 14, 1918, supra, unlike the Statute involved in the Minnesota case, specifically confers jurisdiction upon the District Courts of the State of Oklahoma to order and decree the partition and sale of lands acquired by inheritance and devise by restricted members of the Five Civilized Tribes.

B. The Act involved in the Minnesota case made no provision for the protection of the Indian against an improvident judgment and sale in condemnation, while the Act of June 14, 1918, adopts the applicable statutes of the State of Oklahoma, providing for the partition of real estate, and makes adequate provision for the appraisement and sale of lands acquired by inheritance or devise by restricted members of the Five Tribes under judicial super-

vision in the event partition cannot be made in kind. The District Courts of the State of Oklahoma, in exercising the authority granted to them, act as Federal agencies. They are the agencies selected by Congress and the authority confided to them is to be exercised in giving effect to the will of Congress in respect to a matter within its control.

C. The Secretary of the Interior was granted supervision of the proceeds to be derived from the sale of lands in condemnation by virtue of the Act of Congress of June 30, 1932 (47 Stat. 474) while no such provision has been made by Congress for the supervision of the proceeds to be derived from the voluntary sale, or the sale in partition, of lands acquired by inheritance or devise by restricted members of the Five Civilized Tribes.

VI

The case of Grand River Dam Authority vs. Parker, 40 Fed. Supp. 82, is not applicable or controlling in the determination of this case, for the same reasons assigned to the Minnesota case, supra.

In addition, although the lands involved in the Grand River Dam Authority vs. Parker case were inherited lands yet no question was raised by counsel in the trial of such cause as to the nature of the restrictions existing upon such lands, and it was conceded by all parties to such cause that the lands involved therein were restricted in the same manner and to the same extent as lands allotted to restricted members of the Five Civilized Tribes.

VII

That the plaintiff, D. B. Hellard, is the owner of the legal title in fee simple to the lands involved in this case and above described; that the defendants have no right, title or interest therein; that the plaintiff's title to said lands should be quieted and confirmed in him as against any claim on the part of the defendants and the intervener herein, and that the defendants, and each of them, should be perpetually restrained from claiming or asserting any right, claim or interest therein adverse to the title of the plaintiff.

ROYCE H. SAVAGE,
District Judge.

[File endorsement omitted.]

31 In United States District Court

Judgment

Filed Oct. 30, 1942

This cause comes on to be heard on this 30th day of October 1942; the plaintiff appearing by his attorney of record, George H. Jennings, and the defendants and intervener, United States of America, appearing by the Hon. Whit Y. Mauzy, United States Attorney, and the Court having heard the evidence, and being fully advised, finds the issues in favor of the plaintiff and against the defendants and intervener.

It is therefore ordered, adjudged, and decreed as follows:

That the plaintiff, D. B. Hellard, is the legal owner in possession of the premises described in the complaint herein, to wit:

The Southwest Quarter (SW4) of Section Twenty-five (25), Township Eighteen (18) North, Range Ten (10) East, Creek County, Oklahoma;

and that his title thereto is valid and perfect and superior to any right or interest claimed by defendants, and the intervener herein, and that defendants, and each of them, have no right, title or interest in and to said premises.

It is further ordered, adjudged, and decreed that the title and possession of said plaintiff in said premises be, and the same is hereby forever settled and quieted in the plaintiff as against all claim or demand by said defendants, and those claiming under them, or either of them, and against all claims or demands by the intervener, United States of America.

And it is further ordered, adjudged, and decreed that said defendants, and each of them, and those claiming by, through or under them, or either of them, be, and they are hereby, perpetually enjoined and forbidden to claim any right, title, interest or estate in or to said premises, hostile or adverse to the possession and title of the plaintiff herein.

ROYCE H. SAVAGE, *Judge*.

[File endorsement omitted.]

32 In United States District Court

Notice of appeal to the Circuit Court of Appeals

Filed Jan. 27, 1943

Notice is hereby given that intervener, the United States of America, hereby appeals to the Circuit Court of Appeals for the Tenth Circuit from the judgment entered in this cause on the 30th day of October 1942.

WHIT Y. MAUZY,
United States Attorney for the Northern District of Oklahoma.

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

33 In United States Circuit Court of Appeals

Minute entry

September 7, 1943

This cause came on to be heard, Marvin J. Sonosky, Esquire, appearing for appellant, George H. Jennings, Esquire, appearing for appellee.

Thereupon argument was commenced by counsel and continued to the hour of adjournment.

In United States Circuit Court of Appeals

Minute entry

September 8, 1943

34 This cause came on further to be heard, Marvin J. Sonosky, Esquire, appearing for appellant, George H. Jennings, Esquire, appearing for appellee.

Thereupon argument by counsel was concluded and the cause was submitted to the court.

35 In United States Circuit Court of Appeals, Tenth Circuit

Marvin J. Sonosky, Attorney, Department of Justice, (Norman M. Littell, Assistant Attorney General, Whitfield Y. Mauzy, United States Attorney, and Norman MacDonald, Attorney, Department of Justice, were with him on the brief) for Appellant.

George H. Jennings for Appellee.

Before PHILLIPS, BRATTON, and HUXMAN, Circuit Judges.

Opinion

October 29, 1943

BRATTON, Circuit Judge:

The question presented is whether the full-blood Creek Indian owners of a tract of restricted and tax-exempt land in Oklahoma were divested of title by a sale in partition in an action in the state court to which the United States was not a party.

The land was allotted to an enrolled Creek Indian of the full blood, and it was subsequently selected and certified as tax-exempt under the provisions of section 4 of the Act of May 10, 1928, 45 Stat. 495. The allottee died intestate in 1938, and the land descended in equal share to her son, grandson, and great
36 granddaughter. The son died, and his interest passed to his surviving widow and four children. All of the heirs of the allottee and those of her son were full-blood Creek Indians. In 1940, certain of the heirs instituted in the district court of the state a proceeding to partition the land. All of the heirs were parties but the United States was not, and no notice was served on the Superintendent of the Five Civilized Tribes under the provisions of section 3 of the Act of April 12, 1926, 44 Stat. 239. A judgment of partition was entered, pursuant thereto the land was sold by the sheriff, and D. B. Hellard became the purchaser. Hellard later instituted in the state court this action against the Indian heirs to quiet his title based upon the sheriff's deed. The Indians disclaimed. Notice was served on the Superintendent of the Five Civilized Tribes, the United States caused the action to be removed to the United States court and, later intervened, alleging that the proceedings in partition were void because the United States was not a party to the action, and praying that the sheriff's deed be cancelled and the title of the Indian heirs quieted. The trial court entered judgment quieting title in Hellard, and the United States appealed.

Section 19 of the Act of April 26, 1906, 34 Stat. 137, provides that no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole Tribes shall have power to sell, alienate, or dispose of any of the land allotted to him for a period of twenty-five years from and after the passage of the act, unless such restriction shall prior to the expiration of that period be removed by Act of Congress; and section 22 provides that the adult heirs of any deceased Indian of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his share of the land of the tribe to which he belongs, may

sell and convey the land inherited from such decedent, but that all conveyances made under the provision by heirs who are full-blood Indians shall be subject to the approval of the Secretary of the Interior, under such rules and regulations as may be prescribed by him. Section 1 of the Act of May 27, 1908, 35 Stat. 312, provides among other things that all allotted lands of enrolled, full-blood members of the Five Civilized Tribes shall
37 not be subject to alienation prior to April 26, 1931, except that the Secretary may remove such restrictions in whole or in part, under such rules and regulations as he may prescribe; and section 9, as amended by section 1 of the Act of April 12, 1926, supra, provides that the death of an allottee shall operate to remove all restrictions upon the alienation of such allottee's land, provided that no conveyance by any full-blood Indian of such Tribes of any lands restricted by section 1 acquired by inheritance or devise from the allottee shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of such deceased allottee or testator. And section 1 of the Act of January 27, 1933, 47 Stat. 777, provides that where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase with restricted funds, by or for restricted Indians, such land shall remain restricted and tax-exempt during the life of and as long as it is held by such Indians, but not longer than April 26, 1956. It is clear that under these acts, without more, the district courts in Oklahoma would be without jurisdiction to partition restricted and tax-exempt land acquired through inheritance by full-blood members of the Five Civilized Tribes (Coleman v. Battiest, 65 Okl. 71, 162 Pac. 786; Hoodenpyl v. Champion, 71 Okl. 270, 177 Pac. 369).

But, recognizing the frequent need to partition land acquired in that manner, the Congress enacted the Act of June 14, 1918, 40 Stat. 606. Section 1 authorizes the probate court in Oklahoma having jurisdiction of the settlement of the estate of a deceased allottee, leaving restricted heirs, to determine the question of heirship; and section 2 provides that the lands of full-blooded members of any of the Tribes are made subject to the laws of the state respecting the partition of real estate, and that in case of a sale under a decree, or partition, the conveyance shall operate to relieve the land of all restrictions of every character. Under that statute the district courts of the state have jurisdiction to partition restricted lands acquired through inheritance by full-blood Indian heirs (Salmon v. Johnson, 78 Okl. 182, 189 Pac. 537, certiorari denied, 254 U. S. 641; Haymes v. McDermott,
38 Okl. 147, 256 Pac. 908; United States v. Bond, 108 F. (2d) 504; United States v. Watashe, 117 F. (2d) 947).

The proceedings in the action for partition are not before us but it is stipulated that they were in strict accord with the statutes of the state. The decree in that action and the conveyance executed by the sheriff pursuant to it are attacked on the sole ground that the United States was not a party to the action. The Act of June 14, 1918, supra, does not provide that the United States shall be made a party to an action for partition. It does not speak of making the United States a party. It is significantly silent in that respect. It appears on its face to be a complete enactment, subjects lands of the nature here involved to the jurisdiction of the district courts of the state for purposes of partition, and provides that a sale made in a partition action shall free the lands of all restrictions. Yet it will be searched in vain for any provision, suggestion, or indication of a Congressional intent or purpose to require that the United States shall be made a party to such an action. Congress has plenary power to impose, extend, or remove restrictions against the alienation of property belonging to full-blood members of the Five Civilized Tribes. The determination of the time and manner of imposing or removing restrictions rests with Congress. It was well within the sweep of the power of Congress to provide that lands belonging to full-blood members of the Tribes shall be subject to partition in the state courts, and that a sale made in a proceeding of that nature shall operate to remove all existing restrictions against alienation, without the United States being a party to the action (Hy-yu-tse-mil-kin v. Smith, 194 U. S. 401; Winton v. Amos, 255 U. S. 373). And Congress was free to entrust to the state courts having jurisdiction to partition lands generally the function of determining in a judicial proceeding in partition whether the land shall be sold and if so to order the sale, and that when such sale is made it shall constitute a removal of the restrictions against alienation. In short, Congress was free to select the district courts of the state as the agency and confide to them authority to determine in that manner whether the restrictions shall be extin-
39 guished (Parker v. Richard, 250 U. S. 235; Whitebird v. Eagle-Pitcher Lead Co., 40 F. (2d) 479). Taking into consideration the contex, the background, and the purpose to be served, we think that is the effect of the statute. Cf. Parker v. Richard, supra; Whitebird v. Eagle-Pitcher Lead Co., supra; State v. Huser, 76 Okl. 130, 184 Pac. 113.

As already indicated, section 1 of the Act of June 14, 1918, supra, authorizes the probate court of the state having jurisdiction of the settlement of the estate of a deceased allottee, leaving restricted heirs, to determine the question of heirship, with conclusive effect; section 9 of the Act of May 27, 1908, as amended by the Act of April 12, 1926, supra, provides that the death of an

On consideration whereof, it is now here ordered that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from December 3, 1943, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

38 In United States Circuit Court of Appeals

Order for further stay of mandate

December 31, 1943

This cause came on to be heard on the motion of appellant for a further stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein on or before January 29, 1944, and that, if within said period of time there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

39 [Clerk's certificate to foregoing transcript, omitted in printing.]

40 Supreme Court of the United States.

Order allowing certiorari

Filed March 6, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 48141. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 648. The United States of America, Petitioner vs. D. B. Hellard. Petition for a writ of certiorari and exhibit thereto. Filed January 29, 1944. Term No. 648 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE 1944

FILE COPY

JAN 29 1944

No. 645

In the Supreme Court of the United States

OCTOBER TERM, 1943

UNITED STATES OF AMERICA, PETITIONER

v.

D. B. HEILAND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 648

UNITED STATES OF AMERICA, PETITIONER

v.

D. B. HELLARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered in the above cause on October 29, 1943, affirming the judgment of the United States District Court for the Northern District of Oklahoma in an action to quiet title based on a deed acquired at a partition sale of an Indian allotment.

OPINIONS BELOW

The district court did not write an opinion. The opinion of the circuit court of appeals (R. 33–37) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 29, 1943 (R. 38). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether full-blood Indians of the Five Civilized Tribes can be divested of title to a restricted allotment of land by a sale in a partition proceeding to which the United States is not a party.

STATUTE INVOLVED

Section 2 of the Act of June 14, 1918, 40 Stat. 606 (25 U. S. C., sec. 355) provides:

> That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character.

STATEMENT

A 160-acre tract of land was allotted to a full-blood Creek Indian (R. 4, 21, 24) subject to

Section 1 of the Act of May 27, 1908, 35 Stat. 312, which provided that lands allotted to full-blood Indians of the Five Civilized Tribes should be inalienable prior to April 26, 1931, except that the Secretary of the Interior might remove restrictions in whole or in part under such rules and regulations as he might prescribe. The restriction or alienation was extended to April 26, 1956, by Section 1 of the Act of May 10, 1928, 45 Stat. 495; and the land was selected and certified as tax-exempt under Section 4 of that Act. Upon the death of the allottee in 1938, the land descended in equal shares to her son, grandson, and great-granddaughter. The son died, and his share passed to his widow and four children. (R. 22.) All of the heirs were also full-blood Creek Indians (*ibid.*), and they inherited the land subject to Section 9 of the Act of May 27, 1908, 35 Stat. 312, as amended April 12, 1926, 44 Stat. 239, and continued in force May 10, 1928, 45 Stat. 495, which prescribes that the death of an allottee shall operate to remove all restrictions on alienation of the allottee's land provided that no conveyance thereof by any full-blood Indian heir shall be valid unless approved by the county court having jurisdiction of the settlement of the deceased allottee's estate (R. 28).

On March 20, 1940, the heirs instituted proceedings in the District Court of Creek County, Oklahoma, to partition the allotment (R. 23).

The United States was not a party to the suit, nor was notice of the pendency thereof served upon the Superintendent for the Five Civilized Tribes under Section 3 of the Act of April 12, 1926, 44 Stat. 239 (R. 11–15).[1] On June 24, 1940, a judgment of partition was entered therein, and pursuant to that judgment the land was sold and a sheriff's deed in partition was issued to D. B. Hellard (R. 23).

On July 5, 1941, D. B. Hellard filed the present action in the District Court of Creek County, Oklahoma, against the Indian heirs to quiet his title founded on the deed in partition (R. 4–7). The heirs filed an answer disclaiming any interest in the land (R. 10–11). Hellard caused notice of the pendency of the suit to be served upon the Superintendent for the Five Civilized Tribes (R. 9), and at the instance of the United States the case was removed to the federal district court, all pursuant to Section 3 of the Act of April 12, 1926, 44 Stat. 239 (R. 11–15). After removal, the United States filed a complaint in intervention, alleging that the partition proceedings in the District Court of Creek County, Oklahoma, were void for lack of the United States as a party and

[1] This Section, reproduced in the Appendix, *infra*, provides for notice to the United States of suits in the federal or state courts involving title to or an interest in the restricted lands of Five Tribes Indians and the removal of state court suits to the federal courts at the option of the United States.

praying that the sheriff's deed in partition be set aside and title quieted in the full-blood Indian heirs (R. 17–19). Hellard answered, denying that the United States was an indispensable party and alleging that the partition proceedings were valid and binding (R. 20–21).

The district court held that the partition proceedings were valid even though the United States was not a party thereto and on October 30, 1942, entered its findings of fact, conclusions of law, and judgment quieting title in D. B. Hellard (R. 24–31). On October 29, 1943, the circuit court of appeals affirmed (R. 38).

REASONS FOR GRANTING THE WRIT

1. Allotments such as the one here involved are subject to restrictions on alienation under Section 1 of the Act of May 27, 1908, 35 Stat. 312, as extended by Section 1 of the Act of May 10, 1928, 45 Stat. 495, and Section 9 of the Act of May 27, 1908, as amended by Section 1 of the Act of April 12, 1926, 44 Stat. 239, and continued in force by Section 2 of the Act of May 10, 1928, 45 Stat. 495. Cf. *Parker* v. *Richard*, 250 U. S. 235. Because of those restrictions, such allotments are property in which the United States has an interest. Cf. *Heckman* v. *United States*, 224 U. S. 413; *Bowling & Miami Investment Co.* v. *United States*, 233 U. S. 528; *Privett* v. *United States*, 256 U. S. 201; *Sunderland* v. *United States*, 266

U. S. 226.[2] Any proceeding against property in which the United States has an interest is a suit against the United States, and the United States is an indispensable party thereto. *Minnesota* v. *United States,* 305 U. S. 382. While Congress, by Section 2 of the 1918 Act (*supra,* p. 2), has authorized the bringing of partition actions against restricted allotments by making them "subject to the laws of the State of Oklahoma, providing for the partition of real estate," it has not thereby consented to the maintenance of such actions in the absence of the United States.

Section 2 of the 1918 Act (*supra,* p. 2) does not remove restrictions from restricted allotments unless and until the land is sold at partition sale, an exception designed only to afford a marketable title to purchasers at partition sales. Inasmuch as the allotments remain restricted, at least until after the entry of the decree, the interest of the United States exists throughout partition proceedings. It lies in representing the Indians in such proceedings in the selection and appointment of commissioners; in the obtaining

[2] In the *Bowling* case, the Court said (233 U. S. at 534–535):

"It necessarily follows that, as a transfer of the allotted lands contrary to the inhibition of Congress would be a violation of the governmental rights of the United States arising from its obligation to a dependent people, no stipulations, contracts, or judgments rendered in suits to which the Government is a stranger, can affect its interest. * * *"

of partition in kind if feasible, in conformance to its general policy to preserve for the Indians their restricted lands; and where the property is ordered sold, in protecting the right of the Indian to elect to take at the appraised value or in soliciting for prospective bidders, so that the best possible price may be obtained. The United States is also interested in having the proceeds of these sales retained under federal supervision; and where the land is tax-exempt as well as restricted, as it is in this case (R. 22), in effectuating the authority of the Secretary of the Interior under the Act of June 30, 1932, 47 Stat. 474 (25 U. S. C. sec. 409a) to determine that the proceeds shall be reinvested in other lands subject to the same restrictions. It is interested, too, in making it possible for the Secretary of the Interior to exercise the preferential right to purchase the land at the sale, under the Act of June 26, 1936, 49 Stat. 1967. See 25 Code of Federal Regulations, sec. 241.13. Hence, the decision below is incorrect in holding that the United States was not a necessary party to the partition proceedings here involved, for otherwise the policy of the law which imposed the restrictions would be frustrated.

2. The decision below conflicts with *Minnesota* v. *United States*, 305 U. S. 382, holding that the United States is an indispensable party to condemnation proceedings under Section 3 of the

Act of March 3, 1901, 31 Stat. 1058, 1083–1084 (25 U. S. C. sec. 357) which provides in part:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Just as the United States is interested in and is an indispensable party to condemnation proceedings against restricted Indian lands, it is interested in and is an indispensable party to partition proceedings.[3] The statute authorizing partition "subject to the laws of the State of Oklahoma" does not diminish the interest of the United States, or remove the restrictions, any more than the statute permitting condemnation "under the laws of the State or Territory."

The court below sought to distinguish the *Minnesota* case on the ground that the 1918 partition statute, but not the condemnation Act there involved, contemplated suits in the state courts, and that "the interests of the United States are entrusted to an instrumentality of its own choice—the district court of the state" (R. 36). Although Congress did intend to vest the state courts with

[3] In the *Minnesota* case, the United States owned the fee, but Mr. Justice Brandeis' opinion makes it plain that this was not a crucial factor (305 U. S. at 386, fn. 1).

jurisdiction over partition matters,[4] whereas the practice in condemnation proceedings had been to proceed in the federal courts,[5] the language of the two Acts does not suggest any differentiation in this respect, and certainly does not warrant the conclusion that the United States was to be deprived of its right to protect its interests in the one case any more than in the other. The grant of jurisdiction to the state courts does not make them, any more than are the federal courts in suits involving the Indians, the representatives of the United States in protecting the Indian wards. The functions of the courts in each instance are judicial, and there is no basis for assuming that the state judges in partition proceedings have succeeded to the functions of the United States or the Secretary of the Interior. The latter, for example, alone has power to determine whether the proceeds of a partition sale shall be retained under federal supervision and whether his preferential right of purchase shall be exercised (see p. 7, *supra*).

Except as to forum, Section 2 is thus similar to the statute involved in the *Minnesota* case, and the forum affords no basis for depriving the United States of its right to perform its function of safeguarding the interests of the Indians.

[4] See H. Rep. No. 392, 65th Cong., 2d sess.; S. Rep. No. 330, 65th Cong., 2d sess.; 56 Cong. Rec. pp. 7317–7319.

[5] *Minnesota* v. *United States*, 305 U. S. at 389–390.

The condemnation and partition statutes differ from those relied upon by the Circuit Court of Appeals. The United States is not a necessary party where state courts are authorized to determine who are heirs of deceased Indian allottees, inasmuch as the restrictions on alienation do not prevent inheritance (Act of June 14, 1918, sec. 1, 40 Stat. 606; cf. *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S. 401, 413–414), and the function of the state courts in approving conveyances by Indian heirs (Act of May 27, 1908, 35 Stat. 312, as amended April 12, 1926, 44 Stat. 239) is supervisory, and in such proceedings other methods of protecting the interests of the United States have been provided.[6]

The circuit court of appeals asserts (R. 36) that when the statute in question was enacted, "there was no way under general law in which the United States could be joined in an action of that kind in the state court" and that the legislation should be construed in a manner "which will give it vitality from its inception." But, as in the *Minnesota* case, consent to be sued is the necessary implication of consent to the bringing of partition proceedings, and the United States may be joined in the normal way, *viz*, by service of process upon the United States Attorney and the At-

[6] See Act of January 27, 1933, sec. 8, 47 Stat. 777, providing for the appearance of United States probate attorneys to protect the Indians' interests; cf. *Winton* v. *Amos*, 255 U. S. 373, 392.

torney General. That the forum is a state court is no obstacle. Section 3 of the Act of April 12, 1926, 44 Stat. 239 (see Appendix, *infra*), provides a further method of bringing in the United States, and in addition affords the United States a choice of forum.

3. Partition proceedings under the 1918 Act are ordinarily brought to the attention of the Government by service of notice as provided in Section 3 of the Act of April 12, 1926, 44 Stat. 239 (see Appendix, *infra*). The United States then removes the cause to the federal court, files a complaint in intervention, and participates fully in the partition proceedings. In such cases, the Government is able fully to protect its interest in the allotment, *e. g.*, to see that the proceeds of partition sales are retained under federal supervision. Recently, however, a number of instances have occurred where partition proceedings are instituted in the state court with the United States neither being joined as a party nor served with notice under the 1926 Act, and thereafter a suit to quiet title, based upon the deed obtained as the partition sale is commenced, with notice served under the 1926 Act. In this manner, by instituting two suits and serving notice in the second only, the presence of the United States in the partition case avoided, and the United States is deprived of its opportunity to participate in the determination of matters essential to its protec-

tion of the Indians' rights (see pp. 6–7, *supra*). The decision below will have the effect of upsetting the present customary practice, under which the United States has been given notice of partition proceedings pursuant to the 1926 Act and thus has had an opportunity fully to protect its interests. The court below does not deny that this will be the consequence of its decision, but suggests that the remedy lies with Congress. (R. 37.) The Government believes that under the doctrine of the *Minnesota* case the United States is an indispensable party to partition proceedings and therefore remedial legislation is not required.

The issue presented by this case is involved in several pending cases and will, of course, affect many future partition proceedings.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

JANUARY 1944.

APPENDIX

Section 3 of the Act of April 12, 1926, 44 Stat. 239, provides:

> Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. Duplicate original of the notice shall be filed with the clerk of the court in which the action is pending and the notice shall be served on the Superintendent for the Five Civilized Tribes or, in case of his absence from his principal office, upon one of his assistants, and shall be served within ten days after the general appearance in

the case of the party who causes the notice to be issued. The notice shall be accompanied by a certified copy of all pleadings on file in the suit at the time of the filing of the duplicate original notice with the clerk and shall be signed by the party to the action, or his or her counsel of record and shall be served by the United States marshal and due return of service made thereon, showing date of receipt and service of notice. If notice is not served within the time herein specified, or if return of service thereof be not made within the time allowed by law for the return of service of summons, alias notices may be given until service and return of notice is had and in no event shall the United States be bound unless written notice is had as herein specified: *Provided,* That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court of the United States within twenty days after the filing of the petition for removal and the de-

fendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 648

UNITED STATES OF AMERICA, PETITIONER

v.

D. B. HELLARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH DISTRICT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court wrote no opinion. Its findings of fact, conclusions of law, and judgment appear in the record at pages 19–25. The opinion of the circuit court of appeals (R. 27–31) is reported in 138 F. 2d 985.

JURISDICTION

The judgment of the circuit court of appeals was entered October 29, 1943 (R. 31). The petition for a writ of certiorari was filed January 29, 1944, and was granted March 6, 1944 (R. 32). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether full-blood Indians of the Five Civilized Tribes can be divested of title to restricted land by a sale in a partition proceeding to which the United States is not a party.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 25–28.

STATEMENT

On March 20, 1940, certain full-blood Creek Indians instituted in the District Court of Creek County, Oklahoma, proceedings for the partition of a quarter-section of land which they had inherited from their ancestor, also a full-blood Creek Indian, to whom the land had been allotted as her distributive share of the tribal lands of the Creek Tribe of Indians (R. 3–5, 16–18).[1] The United States was not named as a party to this suit, nor was notice of the pendency thereof served upon the Superintendent for the Five Civilized Tribes under section 3 of the Act of April 12, 1926, 44 Stat. 239[2] (R. 18). On June 24, 1940,

[1] Under Section 23 of the Act of March 1, 1901, 31 Stat. 861, as supplemented by the Act of June 30, 1902, 32 Stat. 500, pursuant to which the land was allotted, the allottee acquired title in fee, subject to restrictions against alienation.

[2] This Section, reproduced in the Appendix, *infra*, pp. 26–28, provides for notice to the United States of suits in the federal or state courts involving title to or an interest in the restricted lands of Five Civilized Tribes Indians and the removal of state court suits to the federal courts at the option of the United States.

judgment of partition was entered therein, and pursuant to that judgment the land was sold and a sheriff's deed in partition was issued to respondent, D. B. Hellard (R. 5, 18).

On July 5, 1941, Hellard filed in the same court the present action against the Indian heirs to quiet his title founded on the deed in partition (R. 3–5). The heirs answered disclaiming interest (R. 8). Hellard caused notice of the pendency of the suit to be served upon the Superintendent for the Five Civilized Tribes (R. 7), and at the instance of the United States the cause was removed to the federal district court, all pursuant to section 3 of the Act of April 12, 1926, Appendix, *infra,* pp. 26–28 (R. 9–11). After removal, the United States filed a complaint in intervention on behalf of itself and the heirs, alleging that the heirs were restricted Indians, that the partition proceedings were void for lack of the United States as a party, and that those proceedings were also void for want of service of notice thereof on the Superintendent of the Five Civilized Tribes as required by section 3 of the Act of April 12, 1926, *supra* (R. 13–15). The prayer was that the deed in partition be set aside and title quieted in the heirs (R. 14–15). Hellard answered, denying that the United States was an indispensable party to the partition proceedings and alleging that those proceedings were valid and binding (R. 15–16).

The district court adjudged that the partition proceedings were valid even though the United States was not a party thereto and on October 30, 1942, entered findings of fact, conclusions of law and judgment quieting title in Hellard (R. 19–25). On October 29, 1943, the circuit court of appeals affirmed (R. 31).

SUMMARY OF ARGUMENT

Since the heirs are of the full Indian blood (R. 20), the lands involved are subject to restrictions on alienation. Act of May 27, 1908, sec. 9, 35 Stat. 312, as amended April 12, 1926, sec. 1, 44 Stat. 239, and extended May 10, 1928, sec. 2, 45 Stat. 495; Act of January 27, 1933, sec. 8, 47 Stat. 777. Cf. *Parker* v. *Richard,* 250 U. S. 235, 238. Because of these restrictions, the land is property in which the United States has an interest. Cf. *Heckman* v. *United States,* 224 U. S. 413, 437–438; *Bowling and Miami Investment Co.* v. *United States,* 233 U. S. 528, 534–535; *Privett* v. *United States,* 256 U. S. 201, 204; *Sunderland* v. *United States,* 266 U. S. 226, 232–233. Any proceeding against property in which the United States has an interest is a suit against the United States, and the United States is an indispensable party thereto. *Minnesota* v. *United States,* 305 U. S. 382, 386–387. While Congress, by Section 2 of the 1918 Act (Appendix, *infra,* p. 25), authorized the bringing of partition actions against restricted land such as here involved by

making the lands "subject to the laws of the State of Oklahoma, providing for the partition of real estate", it did not thereby remove the restrictions in event of the filing of a partition proceeding or consent to the maintenance of such actions in the absence of the United States. Cf. *Minnesota* v. *United States*, 305 U. S. 382, 387–388. Accordingly, the partition proceedings here involved are void, inasmuch as the proceedings were had without the presence of the United States.

Respondent would have been protected if notice of the partition proceeding had been served on the United States pursuant to Section 3 of the Act of April 12, 1926, which establishes a uniform procedure whereby the United States can be served and bound in proceedings involving title to restricted land of an Indian of the Five Civilized Tribes. It has been customary so to serve the United States in these partition proceedings and the United States is expressly concluded by the judgments where so served. Moreover, by virtue of the statutes of limitations of the State of Oklahoma made applicable by Section 2 of the 1926 Act, the United States cannot now attack any title derived from a partition before 1926, or from any partitions after 1926 where the applicable statute of limitations has run. Thus the danger of upsetting titles seen by respondent in the Government's position is exaggerated.

ARGUMENT

FULL-BLOOD INDIANS OF THE FIVE CIVILIZED TRIBES CANNOT BE DIVESTED OF TITLE TO RESTRICTED LAND BY A SALE IN A PARTITION PROCEEDING TO WHICH THE UNITED STATES IS NOT A PARTY

A. *The United States is an indispensable party to proceedings against restricted land.*—The heirs are all Creek Indians of the full-blood (R. 20). Hence, the land involved is subject to restrictions on alienation. Act of May 27, 1908, sec. 9, 35 Stat. 312, as amended April 12, 1926, sec. 1, 44 Stat. 239, and extended May 10, 1928, sec. 2, 45 Stat. 495;[3] Act of January 27, 1933, sec. 8, 47 Stat. 777.[4] Because of these restrictions, the land is property in which the United States has an

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[3] Section 9, as amended, reads:

"The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator * * *."

By Section 2 of the 1928 Act, *supra*, the restriction thus imposed was continued in force until April 26, 1956.

[4] Section 8 provides that:

"* * * no conveyance of any interest in land of any full-blood Indian heir shall be valid unless approved in open court after notice in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma in June of 1914 * * *."

interest. *Heckman* v. *United States,* 224 U. S. 413, 437–438; *Bowling and Miami Investment Co.* v. *United States,* 233 U. S. 528, 534–535; *Privett* v. *United States,* 256 U. S. 201, 204; *Sunderland* v. *United States,* 266 U. S. 226, 232–233. "While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. * * * A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States." *Heckman* v. *United States, supra,* at pp. 437, 438. Since the land is property in which the United States has an interest, any proceeding against it is a suit against the United States, and the United States is an indispensable party thereto. *Minnesota* v. *United States,* 305 U. S. 382, 386–387.

B. *Section 2 of the Act of June 14, 1918, does not remove restrictions in the case of partition proceedings.*—By this section (Appendix, *infra,* p. 25) Congress authorized the bringing of partition actions against restricted lands by subjecting them "to the laws of the State of Oklahoma, providing for the partition of real estate," but it did not thereby permit the bringing of such actions in the absence of the United States. Under section 2 restrictions are not removed from restricted allotments unless and until the land is

sold at partition sale, an exception designed only to afford a marketable title to purchasers at partition sales. If partitioned in kind to full-bloods, the allotments remain restricted. Accordingly, the interest of the United States exists throughout partition proceedings.

Its interest lies in representing the Indians in such proceedings in the selection and appointment of commissioners; in obtaining partition in kind if feasible, in conformance to its general policy to preserve restricted land for the Indians; and where the property is ordered sold, in protecting the right of the Indian to elect to take at the appraised value or in soliciting for prospective bidders, so that the best possible price may be obtained. The United States is also interested in having the proceeds of these sales retained under federal supervision;[5] and where the land is tax-exempt as well as restricted, as it is in this case (R. 19), in effectuating the authority of the Secretary of the Interior under the Act of June 30, 1932, 47 Stat. 474 (25 U. S. C. sec. 409a), to determine that the proceeds shall be reinvested in other lands correspondingly tax-exempt and re-

[5] In contrast to the statute involved in the *Minnesota* case, Section 2 of the 1918 Act (Appendix, *infra*, p. 25) does not specifically provide that the proceeds shall be paid to the Indians. Nor does section 2, expressly or impliedly, authorize any court to determine whether or not such proceeds shall be retained under supervision. If any power or duty to retain the proceeds under supervision exists, it "naturally falls to the Secretary of the Interior." Cf. *Parker* v. *Richard*, 250 U. S. 235, 240.

stricted.[6] It is interested, too, in making it possible for the Secretary of the Interior to exercise his preferential right to purchase the land at the sale, under the Act of June 26, 1936, sec. 2, 49 Sat. 1967.[7] See 25 Code of Federal Regulations, sec. 241.13.

Minnesota v. *United States*, 305 U. S. 382, justifies the view that a statute such as Section 2 of

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[6] The Act of June 30, 1932, reads:

"That whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public-improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance."

[7] Section 2 of the 1936 Act reads:

"Whenever any restricted Indian land or interests in land, other than sales or leases of oil, gas, or other minerals therein, are offered for sale, pursuant to the terms of this or any other Act of Congress, the Secretary of the Interior shall have a preference right, in his discretion, to purchase the same for or in behalf of any other Indian or Indians of the same or any other tribe, at a fair valuation to be fixed by the appraisement satisfactory to the Indian owner or owners, or if offered for sale at auction said Secretary shall have a preference right, in his discretion, to purchase the same for or in behalf of any other Indian or Indians by meeting the highest bid otherwise offered therefor."

the 1918 Act does not remove restrictions and that the governmental interest which the United States has in partition proceedings is such as to require that it be made a party thereto. In that case, this Court held that the United States is an indispensable party to condemnation proceedings under Section 3 of the Act of March 3, 1901, 31 Stat. 1058, 1083–84 (25 U. S. C. sec. 357), which provides:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

This Court said (pp. 387–388):

> Minnesota contends that the United States is not an indispensable party. It argues that since the second paragraph of § 3 of the Act of March 3, 1901, provides that "the money awarded as damages shall be paid to the allottee," the United States has no interest in the land or its proceeds after the condemnation is begun. Under § 5 of the General Allotment Act, Act of February 8, 1887, c. 119, 24 Stat. 388, 389, U. S. C. Title 25, § 348, the Indians' interest in these allotted lands was subject to restraints on alienation; and by § 2 of the Indian Reorganization Act, Act of June 18, 1934, c. 576, 48 Stat. 984, U. S. C. Title

25, § 462, restraints on alienation were extended. The clause quoted may not be interpreted as freeing the allottee's land from the restraint imposed by other acts of Congress. As the parcels here in question were restricted lands, the interest of the United States continues throughout the condemnation proceedings. In its capacity as trustee for the Indians it is necessarily interested in the outcome of the suit—in the amount to be paid. That it is interested, also, in what shall be done with the proceeds is illustrated by the Act of June 30, 1932, c. 333, 47 Stat. 474, U. S. C. Title 25, § 409a, under which the Secretary of the Interior may determine that the proceeds of the condemnation of restricted Indian lands shall be reinvested in other lands subject to the same restrictions."

The statute here involved authorizing partition "subject to the laws of the State of Oklahoma" does not diminish the interest of the United

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"In the *Minnesota* case, the United States owned the fee. The opinion written by Mr. Justice Brandeis (p. 386, n. 1) makes it clear that this was not the crucial factor. It is the "powers and responsibilities" or the governmental obligations of the United States with respect to restricted Indian land which is controlling. In *Town of Okemah* v. *United States* (C. C. A. 10), decided February 18, 1944, the circuit court of appeals accordingly applied the doctrine of the *Minnesota* case in a suit involving condemnation of restricted land belonging to Indians of the Five Civilized Tribes. Copies of the *Okemah* opinion are filed with the Clerk.

States, or remove the restrictions, any more than the statute permitting condemnation "for any public purpose under the laws of the State or Territory." Just as the United States continues to have an interest in and is an indispensable party to condemnation proceedings against restricted Indian lands, it continues to have an interest in and is an indispensable party to partition proceedings.

C. *The reasons advanced by the court below for its holding that the United States is not an indispensable party to partition proceedings are not sound.*—The circuit court of appeals sought (R. 30–31) to distinguish the *Minnesota* case on the ground that the condemnation statute authorizes suits in the federal courts, whereas the Partition Act authorizes suits in the state courts, and that therefore "the interests of the United States are entrusted to an instrumentality of its own choice—the district court of the state." Although Congress did vest the state courts with jurisdiction over partition matters,* it is difficult to under-

* See H. Rep. No. 392, 65th Cong., 2d sess.; S. Rep. No. 330, 65th Cong., 2d sess.; 56 Cong. Rec. pp. 7317–7319. Prior to 1918 the state courts had no jurisdiction to partition the restricted lands of full-blood Indian heirs because such lands were not subject to involuntary alienation. Act of May 27, 1908, sec. 9, 35 Stat. 312; *Coleman* v. *Battiest*, 65 Okla. 71, 162 Pac. 786; *Lewis* v. *Gillard*, 70 Okla. 231, 173 Pac. 1136. Section 2 of the 1918 Act was intended to remove the impediment to their jurisdiction. Also the language of the Act,

stand why vesting state courts with jurisdiction should make them chosen instrumentalities to protect interests of the United States when in similar circumstances vesting federal courts with jurisdiction does not make them such instrumentalities. Between the two, the federal courts would seem to be the more logical recipients of such duties. Comparison of the language of the partition and condemnation acts does not support this distinction made by the court below, and certainly does not warrant the conclusion that the United States was to be deprived of its right to protect its interests in the usual manner through the Secretary of the Interior, in the partition case any more than in the condemnation case. And it is difficult to see how the functions the court is to perform can differ in the two types of cases. A partition suit is as much an adversary proceeding as is a condemnation suit. Equally in each the judge must be impartial and cannot adopt a special protective surveillance in behalf of those of the adversaries who happen to be full blood Indians. There is no basis in the statute for assuming that the state judges in partition proceedings are to drop their judicial attitude and assume the guardianship attitude of the

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"subject to the laws of the State of Oklahoma, providing for the partition of real estate," necessarily implies vesting of jurisdiction in the state courts. Cf. *United States* v. *Jones*, 109 U. S. 513, 515, 519–521.

Secretary of the Interior. Thus, the latter alone has statutory power to determine whether the proceeds of a partition sale shall be reinvested in other lands and whether his preferential right of purchase shall be exercised (see p. 9, *supra*, footnotes 6 and 7).

Except as to forum, Section 2 of the 1918 Act is similar to the statute involved in the *Minnesota* case, and the forum affords no basis for, but on the contrary argues against, depriving the United States of its right to safeguard its governmental interests in the restricted land of the Indians.

The circuit court of appeals also stated (R. 30) that when the partition statute was enacted, "there was no way under general law in which the United States could be joined in an action of that kind in a state court" and that the legislation should be construed in a manner "which will give it vitality from its inception." But, as in the *Minnesota* case, the United States impliedly consented to be sued when it consented to the bringing of partition proceedings, and it has always been possible to join it in the normal way, *viz.*, by service of process upon the United States Attorney and the Attorney General. Cf. *Town of Okemah* v. *United States* (C. C. A. 10), decided February 18, 1944. That the forum is a state court is no obstacle. Cf. *Minnesota* v. *United States*, 305 U. S., at pp. 389–390, n. 5; *United States* v. *Jones*, 109 U. S. 513, 515, 519–521.

The court below said (R. 30) that it has never been understood that proceedings to determine heirship under Section 1 of the 1918 Act (Appendix, *infra*, p. 25) or proceedings for the approval of conveyances by full-blood Indian heirs under Section 9 of the Act of May 27, 1908, 35 Stat. 312, as amended April 12, 1926, 44 Stat. 239 (*supra*, p. 6) are "void unless the United States is joined as a party or given notice" and it concluded that just as in "such instances the United States is represented by its chosen instrumentality—the county court," so "in an action in partition under the Act of June 14, 1918, *supra*, the interests of the United States are entrusted to an instrumentality of its own choice—the district court of the state." However, this argument by analogy is not persuasive that the United States is not a necessary party to partition proceedings.

The United States is not a necessary party to proceedings to determine heirship because the only interests directly involved in such proceedings are those of heirs. No governmental interest of the United States is directly involved, inasmuch as the restrictions on alienation do not prevent inheritance. Cf. *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S. 401, 413–414. Moreover, the determination of heirship does not directly affect the restrictions on the land or the land itself. The restricted property of the deceased Indian is not within the jurisdiction of the probate courts and is not sub-

ject to administration by those courts. *Cowokochee* v. *Chapman*, 90 Okla. 121, 124, 215 Pac. 759 (1922), certiorari denied, 263 U. S. 713; *March* v. *Peter*, 179 Okla. 207, 212–213, 64 P. 2d 912 (1936). By nature a proceeding to determine heirs is such that a probate court may render a valid judgment even though it does not have before it all possible claimants to heirship. In a partition suit, however, the district court must have jurisdiction not only of the land but of all parties representing every interest in the land before it has power to partition any of the land. The absence of any interest is fatal to the jurisdiction to partition. Cf. *Barney* v. *Baltimore City*, 6 Wall. 280.

Nor does comparison between the district court acting in partition proceedings and the county court acting in proceedings for the approval of conveyances of full-blood Indian heirs advance the argument of the court below. In the latter instance there is no doubt that the county court acts as a federal instrumentality. It was substituted for the Secretary of the Interior who formerly performed the same function. See Act of April 6, 1906, sec. 22, 34 Stat. 137. Congress designated the county court as it might have designated the Superintendent for the Five Civilized Tribes. Cf. *Parker* v. *Richard*, 250 U. S. 235, 238–239. That court is a probate court accustomed to acting in guardianship matters (cf. sec. 6 of the Act of May 27, 1908) and hence was

selected by Congress as a federal agency well qualified to perform the same role formerly exercised by the Secretary of the Interior.[10] In approving conveyances the county court performs no judicial duties. The function of the court is purely administrative. *Haddock* v. *Johnson,* 80 Okla. 250, 251, 194 Pac. 1077, 1079; *Molone* v. *Wamsley,* 80 Okla. 181, 182, 195 Pac. 484, 485–486.[11] When the court approves or disapproves a deed the United States is present through the court acting as its agent. The court can ade-

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[10] Cf. *United States* v. *Goldfeder*, 112 F. 2d 615 (C. C. A. 10) holding that as a condition of its approval of a full-blood Indian heir's exchange of restricted land for unrestricted land the county court could require that the deed to the Indian contain a restrictive clause forbidding alienation without the county court's approval.

[11] Writes of certiorari and like writs will not lie from an order approving or disapproving a conveyance, and the Supreme Court of Oklahoma is without power to promulgate any rules governing the county court's actions as a federal agency. *Haddock* v. *Johnson*, *supra*, p. 253. Nor is the county court bound by a state statute specifying a procedure to be followed in performing its federal duties. *Molone* v. *Wamsley*, *supra*, p. 183.

Prior to 1933 an appeal would not lie from an order disapproving such a conveyance. *In re Estate of Coachman*, 77 Okla. 185, 187 Pac. 465. By Section 8 of the Act of January 27, 1933, 47 Stat. 777, Congress directed that the approval be in open court after notice in accordance with the rules of the Supreme Court of Oklahoma governing procedure in probate matters, with the right of appeal by the probate attorneys provided for to the state district court for the district in which the county lay. This did not change the administrative nature of the function; it simply prescribed a change in the procedure to be followed.

quately protect the governmental interest since the proceedings for approval of conveyances, unlike partition proceedings, are non-adversary. Moreover, in such cases the power to convey is in the Indian, not in the court, and the alienation is voluntary and not by judicial process.[12] On the other hand, as noted, *supra*, p. 13, the state district court is a trial court of general jurisdiction poorly suited to the role of guardian which the court below would bestow on it in adversary proceedings looking toward the involuntary alienation of land through partition.

D. *A procedure for serving and binding the United States is that set forth in the Act of April 12, 1926.*—In order to provide a uniform means whereby the interests of the United States could be concluded in all cases affecting restricted Indian land, Congress enacted the Act of April 12, 1926, 44 Stat. 239. Section 3 of this Act provides for the service of notice of the pendency of the action upon the Superintendent for the Five Civilized Tribes and thereafter the United States is bound by the proceedings and judgment whether it appears or not. Provision is made for the appearance of the United States and at its option for removal to the federal district court.

[12] In addition, the United States provides protection for the Indians themselves by making provision for probate attorneys to appear and represent the Indians in those proceedings. Act of January 27, 1933, sec. 8, 47 Stat. 777. Cf. *Winton* v. *Amos*, 255 U. S. 373, 392.

Following the enactment of Section 3 it became customary in partition proceedings instituted under authority of Section 2 of the 1918 Act to bind the United States by serving notice on the Superintendent in the manner specified in the 1926 Act.[13] Where notice is served it is at present the uniform practice of the Government to remove partition cases to the federal court, file complaints in intervention, and to participate fully in the proceedings.

As to those litigants who failed to bind the United States under the 1926 Act, there still is available the protection of the statutes of limitations of the State of Oklahoma, which are made

[13] We are advised by the Interior Department that since the enactment of Section 3 the Superintendent has been served with notices in approximately 4,700 cases. Of these about 496 notices were served in actions to partition restricted land, as follows: 1926–1934, inclusive, 47; 1935—18; 1936—45; 1937—32; 1938—39; 1939—69; 1940—67; 1941—92; 1942—30; 1943—46; as of March 20, 1944—11. There are now 45 partition cases affecting restricted Indian land pending in the United States District Court for the Northern District of Oklahoma and in the United States District Court for the Eastern District of Oklahoma. It may be that since 1926 there were instituted partition proceedings affecting restricted Indian land in which no notice was served on the Superintendent. There is no practical way of determining the number of such instances. However, as it is now estimated that there are only some 23,000 full-blood Indians of the Five Civilized Tribes, and in view of the substantial number of partition cases in which notices were served, it seems unlikely that there were many partition cases where no notices were served.

applicable by Section 2 of that Act (Appendix, *infra,* p. 26). Under this Section all rights and causes of action which accrued to any Indian, his heirs or grantees, or to the United States on behalf of any such Indian, before or after the passage of the Act of 1926 are made subject to the statutes of limitation of the State of Oklahoma. In consequence, the United States is barred by the Oklahoma statutes of limitations from challenging title depending on any judgment in partition entered since 1918, except any such judgment so recent that the statute of limitations has not yet run.

The court below, however, rejected the applicability of the 1926 Act to partition proceedings under the 1918 Act (R. 30). The court reasoned that if the United States was an indispensable party under the 1918 Act, and if the 1926 Act governed procedure under the 1918 Act, then the court would be compelled to conclude that prior to the 1926 Act no procedure existed for suing the United States under the 1918 Act, and the United States being an indispensable party to a partition under that Act, no valid partition could have occurred prior to 1926, thus rendering the 1918 Act nugatory for the first eight years of its life. But this reasoning is fallacious, for it assumes, contrary to settled law, that in the absence of express assent to suit and detail of procedure, such as the 1926 Act,

the United States may not be joined as a defendant (but see *supra*, p. 14). Consequently, prior to the 1926 Act the consent of the United States to be joined in these partition proceedings was to be inferred from the necessity that it be joined to make the proceedings effectual. The absence of a federal statute detailing the procedure was immaterial since the 1918 Act provided for partition proceedings governed by Oklahoma law, under which the United States could be served as any other litigant. The enactment of the 1926 Act merely made the procedure in Section 3 thereof available as the means of serving and binding the United States, by providing a uniform procedure applicable to all suits involving interests in or title to land allotted to restricted members of the Five Civilized Tribes.

The purpose that the 1926 Act shall apply to partition proceedings under the 1918 Act is apparent from its broad language.[14] An exception must be read into that language which is not justified by its broad scope if it is not to apply to partition proceedings under the 1918 Act. Moreover, if partition proceedings are to be ex-

[14] The legislative history is inconclusive except that it also shows a broad purpose to establish certainty of titles derived from Indians by specifying how the United States may be concluded. Cf. *Caesar* v. *Burgess*, 103 F. 2d 503 (C. C. A. 10); *United States* v. *Fixico*, 115 F. 2d 389 (C. C. A. 10). See H. Rep. 322, 69th Cong., 1st Sess.; S. Rep. 317, 69th Cong., 1st Sess.

cepted from the scope of section 3 they also must be excepted from the scope of section 2, which subjects claims of Indians and of the United States to the Oklahoma statutes of limitations. This likewise would be a *tour de force* unjustified by the broad language of the statute. It is plain from a consideration of sections 2 and 3 together that they were intended to apply to all land title proceedings involving members of the Five Civilized Tribes in which the United States might claim an interest or participation. In the future titles to such land could be secured against claims of the United States by use of the procedure set forth in section 3. Titles already secured as well as future titles were to be protected by the statute of limitations and the United States was, by section 2, given two years from the date of enactment in which to contest titles against which the statute otherwise would have run. No reason exists why this integrated scheme should be held inapplicable to the 1918 partition act.

If the decision below is permitted to stand litigants will not follow the present practice of serving notice on the Superintendent and thus the United States will be precluded from participating in the partition proceedings. On the other hand, if the decision below is reversed, the practice of the last 18 years of serving notice in partition proceedings under the 1926 Act will

be preserved and the interests of the United States and its restricted wards will be fully protected.

E. *The Government's position will not upset established land titles.*—Respondent has contended (Answer to Pet., p. 2) that the Government's position would, if accepted, overturn a rule of property on which established titles depend. Assuming that a rule of procedure can become a rule of property, and assuming further that the foundation exists on which the rule of property contended for can be based,[15] respondent's contention is nonetheless without merit. As we have shown, *supra*, pp. 18–22, the 1926 Act is applicable so that existing titles are protected by the facts that: (1) the procedure it prescribes has customarily been followed in partition suits with the result that the United States is expressly concluded in the bulk of the cases by having been served notice; and (2) in cases before 1926 and some since then in which the United States was not made a party or served notice the statute of limitations has run to prevent the United States from contesting the titles. Doubtless titles will be upset in any remaining cases but there is no reason to believe that that number will be sub-

[15] The decisions below are the first ones to hold specifically that the United States need not be joined. In the state court case relied on the United States was not made a party or notified and was not represented.

stantial.[16] Concern for the unknown but probably insubstantial number who could have but did not comply with the 1926 Act notwithstanding that compliance was customary, should not outweigh the real interest of the United States in having its interest recognized so that its guardianship of the Indian may be fulfilled.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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APRIL 1944.

[16] In such cases a purchaser at a partition sale has a personal right of action against the Indian. *Heckman* v. *United States*, 224 U. S. 413, 446. Also, he may have a cause of action against the sheriff for the recovery of the price paid. A partitioner can, of course, institute another partition proceeding.

APPENDIX

Sections 1 and 2 of the Act of June 14, 1918, 40 Stat. 606 (25 U. S. C. sec. 355, 375), provide:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said State for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: *Provided,* That an appeal may be taken in the manner and to the court provided by law, in cases of appeal in probate matters generally: *Provided further,* That where the time limited by the laws of said State for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts, a petition may be filed therein having for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, but this proviso shall not be construed to reopen the question of the determination of an heirship already ascertained by competent legal authority

under existing laws: *Provided further,* That said petition shall be verified, and in all cases arising hereunder service by publication may be had on all unknown heirs, the service to be in accordance with the method of serving nonresident defendants in civil suits in the district courts of said State; and if any person so served by publication does not appear and move to be heard within six months from the date of the final order, he shall be concluded equally with parties personally served or voluntarily appearing.

SEC. 2. That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character.

Sections 2 and 3 of the Act of April 12, 1926, 44 Stat. 239, provide:

SEC. 2. The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or hereafter accruing to any such Indians or their heirs or grantees, to the same ex-

tent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his or her heirs or grantees, either in his own behalf or by the Government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said State; *Provided*, That no cause of action which heretofore shall have accrued to any such Indian shall be barred prior to the expiration of a period of two years from and after the approval of this Act, even though the full statutory period of limitation shall already have run or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations.

SEC. 3. Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial

court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. Duplicate original of the notice shall be filed with the clerk of the court in which the action is pending and the notice shall be served on the Superintendent for the Five Civilized Tribes or, in case of his absence from his principal office, upon one of his assistants, and shall be served within ten days after the general appearance in the case of the party who causes the notice to be issued. The notice shall be accompanied by a certified copy of all pleadings on file in the suit at the time of the filing of the duplicate original notice with the clerk and shall be signed by the party to the action or his or her counsel of record and shall be served by the United States marshal and due return of service made thereon, showing date of receipt and service of notice. If notice is not served within the time herein specified, or if return of service thereof be not made within the time allowed by law for the return of service of summons, alias notices may be given until service and return of notice is had and in no event shall the United States be bound unless written notice is had as herein specified: *Provided;* That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending

in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court of the United States within twenty days after the filing of the petition for removal and the defendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court.

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No. 648

In the Supreme Court of the United States

October Term, 1943.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

D. B. HELLARD, *Respondent.*

Answer to Petition for Writ of Certiorari.

GEORGE H. JENNINGS,
Sapulpa, Oklahoma,
Counsel for Respondent.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1943.

No. 648

UNITED STATES OF AMERICA, *Petitioner,*
vs.
D. B. HELLARD, *Respondent.*

ANSWER BRIEF TO THE PETITION FOR WRIT OF *CERTIORARI.*

Statement.

We respectfully assert that a consideration of the decision below clearly demonstrates that it is in entire harmony with the former decisions of the Circuit Court of Appeals for the Tenth Circuit, and of the Supreme Court of the State of Oklahoma, construing the enactment in question. It is also in accord with the former decisions of this Honorable Court, and is sustained by the legislative history of the Act, as well as by the construction given thereto by the Honorable Secretary of the Interior(1).

This enactment was first construed by the Supreme Court of the State of Oklahoma in *Salmon* v. *Johnson*, 78

(1)

Prior to the adoption of the Act of June 14, 1918, 40 Stat. 606, the courts were without jurisdiction to enter a binding decree determining heirship affecting restricted land. *Wolf* v. *Gills*, 96 Okl. 6, 219 Pac. 350; *Cowskochee* v. *Chapman*, 90 Okl. 121, 215 Pac. 759, *certiorari* denied 263 U. S. 713. They were likewise without jurisdiction to partition lands

Okl. 182, 189 Pac. 537, *certiorari* denied 254 U. S. 641, decided on April 6, 1920. The rule announced in that case has been followed without departure by the courts of the State of Oklahoma, as well as by the Federal courts. (See cases cited in footnote 1.)

This construction of the statute has governed the transfers of real estate for more than twenty years, and it has become a rule of property. It should not be overturned even though such construction were open to doubt. *Truskett* v. *Closser*, 236 U. S. 223; *United States* v. *Lee*, (C. C. A. 10), 108 F. (2d) 936.

Wherefore, respondent most respectfully prays that the petition for writ of *certiorari* be dismissed, or in the alternative, denied.

GEORGE H. JENNINGS,
Sapulpa, Oklahoma,
Counsel for Respondent.

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where an interest was acquired by inheritance by full-blood Indians. *Hoodenpyl* v. *Champion*, 71 Okl. 270, 177 Pac. 369; *Salmon* v. *Johnson*, 78 Okl. 182, 189 Pac. 537, *certiorari* denied 254 U. S. 641.

The purpose of Section 1 of the Act was to vest the courts of Oklahoma with jurisdiction to conclusively determine the heirship of deceased allottees (*State, ex rel. Miller* v. *Huser*, 76 Okl. 130, 184 Pac. 113; *In re Fulsom's Estate*, 141 Okl. 300, 285 Pac. 13; *Pitman* v. *Commissioners of Internal Revenue*, (C. C. A. 10) 64 F. (2d) 740; *Roberts* v. *Anderson*, (C. C. A. 10) 66 F. (2d) 874); and with jurisdiction to order and direct the partition of the lands acquired by full-blood Indian heirs. *Salmon* v. *Johnson*, 78 Okl. 182, 189 Pac. 537, *certiorari* denied 254 U. S. 641; *United States* v. *Bond*, (C. C. A. 10) 108 F. (2d) 504; *United States* v. *Watashe*, (C. C. A. 10) 117 F. (2d) 947.

Accord: S. Rep. No. 330, 65th Congress, 2nd Session; Cohen, Handbook of Federal Indian Law (1942), pp. 379 (footnote 178), 446; Memo. Sol. I. D. September 21, 1935.

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No. 648

In the Supreme Court of the United States

October Term, 1943.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

D. B. HELLARD.

BRIEF of RESPONDENT.

GEORGE H. JENNINGS,
Sapulpa, Okla.,
Counsel for Respondent.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1943.

No. 648

UNITED STATES OF AMERICA, *Petitioner,*

vs.

D. B. HELLARD.

BRIEF *of* RESPONDENT.

The Government presents but one question for determination in this case, that is, whether or not the United States is a necessary and indispensable party to an action instituted in the courts of the State of Oklahoma, pursuant to the provisions of Section 2 of the Act of Congress of June 14, 1918, 40 Stat. 606, for the partition of lands acquired by inheritance by full-blood members of the Five Civilized Tribes.(1)

In order to more clearly present the issues, and for convenience, we preface our further statement of the case by setting forth in full the Act of Congress of June 14, 1918, as follows:

"An Act to provide for a determination of heirship in cases of deceased members of the Cherokee,

(1) It has never been so contended until the present case.

Chickasaw, Choctaw, Creek and Seminole Tribes of Indians in Oklahoma, conferring jurisdiction upon District Court to partition lands belonging to full-blood heirs of allottees of the Five Civilized Tribes, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said state for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: *Provided,* That an appeal may be taken in the manner and to the court provided by law, in cases of appeal in probate matters generally: *Provided further,* That where the time limited by the laws of said state for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts, a petition may be filed therein having for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, but this proviso shall not be construed as to reopen the question of the determination of an heirship already ascertained by competent legal authority under existing laws: *Provided further,* That said petition shall be verified, and in all cases arising hereunder service by publication may be had on all unknown heirs, the service to be in accordance with the method of serving nonresident defendants in civil suits in the District Court of said state; and if any person so served by publication does

not appear and move to be heard within six months from the date of the final order, he shall be concluded equally with parties personally served or voluntarily appearing.

"*Sec. 2.* That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character."

This Act is found in Volume 4, Kappler, Indian Affairs, Laws and Treaties, at page 179. Section 1 is also found in 5 F. C. A., Title 25, Section 375; and Section 2 is found in the same volume under Title 25, Section 355.

Statement of the Case.

This action was instituted in the District Court of Creek County, Oklahoma, by the respondent, plaintiff below, to quiet title to lands comprising the allotment of Polly Charcotetenna, deceased; the title to which was acquired by him pursuant to a judgment entered in the same court ordering and directing the partition and sale of such lands (R. 3-7).

Notice of the pendency of the action was given to the Superintendent of the Five Civilized Tribes in the manner provided by Section 3 of the Act of Congress of April 12, 1926, 44 Stat. 239 (R. 7); and the cause was removed by the Government to the United States District Court for the Northern District of Oklahoma, in the manner provided by such Act of Congress (R. 9-11).

The Government filed a petition of intervention in the case after removal, in which it contended, in substance (R. 13-15), that the District Court of Creek County, Oklahoma, was without jurisdiction to order and direct the partition and sale of the lands involved herein, for the asserted reasons: *(1)* Because of the absence of the United States as a necessary and indispensable party; and *(2)* because notice of the pendency of the action was not given to the Superintendent of the Five Civilized Tribes pursuant to the provisions of the Act of Congress of April 12, 1926.

The case was submitted to the trial court upon an agreed statement of fact, the material part of which discloses (R. 16-18):

The lands in question were allotted to Polly Charcotetenna, a full-blood member of the Creek or Muskogee Tribe of Indians, as her distributive share of the lands of such tribe; and they were duly selected by her as tax-exempt under the provisions of the Act of Congress of May 10, 1928, 45 Stat. 495.

The allottee died intestate on January 5, 1938, leaving surviving as her heirs, a son, John Hay; a grand-son, Anderson Allen, and a great grand-daughter, Ethleene Fulsom, now Bevenue. John Hay thereafter died intestate, leaving surviving as his heirs, Sakotah Hay, his widow; Deshalecoweney Hay, a son; Modie Hay, a son; Eva Barnett, *nee* Hay, a daughter; and Lofa Hay, a son. The heirs of both decedents were full-blood Creek Indians.

On April 20, 1940, an action was instituted in the District Court of Creek County, Oklahoma, by Ethleene Fulsom, now Bevehue, Deshalecowenen Hay, Modie Hay, Eva Barnett, *nee* Hay, and Lofa Hay, as plaintiffs, against Anderson Allen and Sakotah Hay, as defendants, seeking the

partition of these lands. On June 24, 1940, and after service of process duly had upon the defendants, a judgment was entered in said cause ordering and directing the partition and sale of the lands; and pursuant to this judgment the lands were later sold to the plaintiff, D. B. Hellard, by the sheriff of Creek County, Oklahoma. The sale was confirmed by the court, and no appeal was had therefrom, and a sheriff's deed in partition was duly issued to the plaintiff.

It was also agreed that the partition proceedings were conducted in strict conformity to the statutes of the State of Oklahoma providing for the partition of real estate; but the United States was not named a party defendant in such action, and it was not served with process, and notice of the pendency of the action was not given to the Superintendent of the Five Civilized Tribes as authorized by the Act of Congress of April 12, 1926, 44 Stat. 239 (R. 18).

The trial court made findings of fact conforming to the agreed statement of fact, and entered its conclusions of law, in which it was concluded, in substance (R. 19-24), that the United States was not a necessary party to the partition action in the state court, and that service of notice in the manner authorized by the Act of Congress of April 12, 1926, was not a prerequisite to the jurisdiction of such court to order and direct the partition and sale of the lands. A formal decree was entered in the cause quieting the plaintiff's title to such lands (R. 25).

The Circuit Court affirmed (R. 31; 138 F. (2d) 985).

ARGUMENT and AUTHORITIES.

The Act of May 27, 1908, 35 Stat. 312, was a revising statute, and was intended as a substitute for all former acts relating to restrictions upon the alienation of allotted and inherited Indian lands of members of the Five Civilized Tribes, and operated to repeal all previous congressional enactments and treaty provisions in conflict therewith upon the same subject. *Stewart* v. *Keyes,* 295 U. S. 403, 55 S. Ct. 807, 79 L. ed. 1507; *Welch* v. *First Trust and Savings Bank,* (C. C. A. 8) 15 F. (2d) 184; *Chupco* v. *Chapman,* 76 Okl. 201, 170 Pac. 259, *certiorari* denied 247 U. S. 506, 38 S. Ct. 427, 62 L. ed. 1240. The act dealt with restrictions relating to lands of living allottees separately from those relating to inherited lands.(2)

Section 1 of the Act applies exclusively to the lands of living allottees. It freed from restrictions all lands of mixed-blood allottees having less than one-half Indian blood, and all lands, except homestead, of mixed-blood allottees having half or more than half and less than three-quarters Indian blood. The original restrictions were continued on other allotted lands until April 26, 1931. These restrictions were extended for an additional period of twenty-five years by Section 1 of the Act of May 10, 1928, 45 Stat. 495.

By the provisions of Section 9 of the 1908 Act, the death of the allottee operated to remove all restrictions upon the alienation of allotted lands, except that qualified restric-

(2) Congress, in dealing with the Five Civilized Tribes, has consistently imposed different restrictions upon the alienation of lands by those to whom the lands were allotted while they were living, than upon the heirs of such allottees. Secs. 19, 22, Act of Congress of April 26, 1906, 34 Stat. 137; Secs. 1, 9, Act of May 27, 1908, 35 Stat. 312. See also, Harris v. Bell, 254 U. S. 103, 41 S. Ct. 49, 65 L. ed. 159.

tions were continued as to the full-blood heir, so as to require the approval of the conveyance of such heir by the proper county court of the State of Oklahoma. *Parker* v. *Richard,* 250 U. S. 235, 39 S. Ct. 442, 63 L. ed. 954; *Harris* v. *Bell,* 254 U. S. 103, 41 S. Ct. 49, 65 L. ed. 159; *Stewart* v. *Keyes,* 295 U. S. 403, 55 S. Ct. 807, 79 L. ed. 1507. By the amendment of April 12, 1926, 44 Stat. 239, the qualified restrictions were extended so as to embrace the interest in lands acquired from an allottee, by a full-blood devisee.

The 1908 Act made no provision for the determination of the heirship of deceased allottees, and made no provision authorizing full-blood heirs to make a division among themselves of lands inherited in common by them. The courts were, therefore, without jurisdiction to enter a binding decree determining the heirship of deceased allottees in so far as restricted lands were concerned. *Wolf* v. *Gills,* 96 Okl. 6, 219 Pac. 350; *Cowokochee* v. *Chapman,* 90 Okl. 121, 215 Pac. 759, *certiorari* denied 263 U. S. 713, 44 S. Ct. 132, 68 L. ed. 520. The courts were likewise without jurisdiction to order and direct the partition of lands, where any interest was acquired by inheritance by full-blood members of these tribes. *Hoodenpyl* v. *Champion,* 71 Okl. 270, 177 Pac. 369; *Salmon* v. *Johnson,* 78 Okl. 182, 189 Pac. 537, *certiorari* denied 254 U. S. 641, 41 S. Ct. 13, 65 L. ed. 452.

The obvious purpose of Congress in the enactment of Section 1 of the 1918 Act was to vest the courts of the State of Oklahoma with jurisdiction to determine the heirship of the allottee, in order that the full-blood Indian heir might convey a merchantable title to his inherited lands, and thus receive for them a sum commensurate with the value of the lands.

And its plain purpose in the enactment of Section 2 of

the act was to vest the courts of the State of Oklahoma with jurisdiction to order and direct the partition of lands inherited by full-blood heirs, in order that the heirs might put an end to the tenancy in common in lands inherited by them, so as to vest in each heir the title to, and the use in severalty of, some definite part of the property so owned in common, so that each heir might enjoy and improve his separate estate without let or hindrance from the other heirs, or their grantees.(3)

The 1918 Act has received the consideration of the courts in numerous cases and it is definitely settled that Section 1 of the Act vests the courts of the State of Oklahoma with jurisdiction to conclusively settle and determine the heirship of deceased allottees of the Five Civilized Tribes. *State, ex rel. Miller,* v. *Huser,* 76 Okl. 130, 184 Pac. 113; *In re Fulsom's Estate,* 141 Okl. 300, 285 Pac. 13; *Pitman* v. *Commissioner of Internal Revenue,* (C. C. A. 10) 64 F. (2d) 740; *Roberts* v. *Anderson,* (C. C. A. 10) 66 F. (2d) 874.

It is likewise definitely settled that Section 2 of the Act vests the courts of the state with jurisdiction to entertain an action for the partition of lands acquired by inheritance or devise by restricted members of these tribes. *Salmon* v. *Johnson,* 78 Okl. 182, 189 Pac. 537, *certiorari* denied 254 U. S. 641, 41 S. Ct. 13, 65 L. ed. 452; *Haymes* v. *McDermott,* 125 Okl. 147, 256 Pac. 908; *United States* v. *Bond,* (C. C. A. 10) 108 F. (2d) 504; *United States* v. *Watashe,* (C. C. A. 10) 117 F. (2d) 947. It is also settled that the Act of January 27, 1933, 47 Stat. 777, does not narrow that part of the 1918 Act which consents to the making of the lands of full-blood members of the Five Civilized Tribes subject to

(3) See: S. Rep. No. 330, 65th Congress, 2nd Sess.

the laws of the State of Oklahoma relating to the partition of real estate. *United States* v. *Bond, supra.*(4)

We respectfully assert that the language of the involved act is plain and unambiguous, and it is evident that Congress not only intended to vest the courts of the State of Oklahoma with jurisdiction to entertain such proceeding, but as well to adopt, as laws of the United States, the statutes of the state defining necessary parties, the requisites of pleadings, the form of process, and manner for service thereof, as well as all other statutory provisions of the state necessarily involved in the commencement, trial, and conclusion of an action for partition of real estate.(5)

It will be observed that this act made no provision for making the United States a party to such proceeding, and that no other act of Congress then in force made such provision. It is evident that Congress did not intend that the United States become a party to such proceeding—otherwise, it must be held that the act in question was wholly without force and effect until the effective date of Section 3 of the Act of April 12, 1926, 44 Stat. 239,(6) for it is well settled that the United States cannot be made a party to any proceeding without congressional consent. *State of Minnesota* v. *United States,* 305 U. S. 382, 59 S. Ct. 292, 83 L. ed. 1345. A consideration of the history of the Government's dealings

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(4) Accord: Cohen, Handbook of Federal Indian Law (1942), p. 446; Memo. Sol. I. D., September 21, 1935.

(5) In Joines v. Patterson, 274 U. S. 544, 549, 47 S. Ct. 706, 71 L. ed. 1194, it is held: "When extended over Indian Territory, the specified laws of Arkansas carried the settled constructions placed upon them by courts of that state. So construed, they became, in effect, laws of the United States as though originally enacted by Congress for government of that territory."

(6) The provisions of Section 3 of the 1906 Act, authorizing the giving of notice to the Superintendent of the Five Civilized Tribes of the pendency of an action, are neither directory nor mandatory—they are permissive only. It was so held in Ceasar v. Burgess, (C. C. A. 10), 103 F. (2d) 503.

with the Five Civilized Tribes, as shown by the respective congressional enactments relating to their property and affairs, discloses that Congress has, in many instances, delegated power and authority to the courts of the state to administer the affairs and property of restricted members of these tribes. Among these provisions, are: *(a)* Section 6 of the Act of May 27, 1908, *supra,* which confers jurisdiction upon the County Courts of the state to administer the property and affairs of minor members of these tribes; *(b)* Section 8 of the Act of May 27, 1908, *supra,* amending Section 23 of the Act of April 26, 1906, 34 Stat. 137, which vests the judges of the county courts of the state with power to acknowledge and approve wills of full-blood Indians, and makes such approval a condition to the validity of such will in certain instances; *(c)* Section 9 of the Act of Congress of May 27, 1908, *supra,* as amended by Section 1 of the Act of April 12, 1926, *supra,* conferring jurisdiction upon the county courts to approve conveyances made by full-blood heirs and devisees; and *(d)* Section 1 of the 1918 Act, *supra,* which confers jurisdiction upon the county courts of the state to determine the heirship of deceased restricted members of these tribes. A consideration of these respective enactments is important in the determination of the construction to be placed upon the involved enactment if there be any ambiguity in the language of the act, or any doubt as to the meaning to be ascribed to its terms, for if the United States is a necessary party to an action brought under Section 2 of this Act for the partition of lands inherited by full-blood heirs, it is likewise a necessary party to any proceeding authorized by the statutory provisions above cited.

These respective statutes have received the consideration of both the state and federal courts in numerous cases,

and it has never been indicated or suggested that the United States is a necessary party to any proceeding authorized thereby.(7)

The petitioner concedes that the United States is not a necessary party to a proceeding for the approval of a conveyance by a full-blood heir, or to proceedings for determination of heirship (Br., pp. 13-17).(8) In an endeavor to distinguish between the power conferred by the respective statutes, *supra*, petitioner says that the county courts are "well qualified to perform the same paternalistic role formerly exercised by the Secretary of the Interior," while "the state district court is a trial court of general jurisdiction poorly suited to the paternalistic role of guardian,"(9) and for

(7) It was expressly held in United States v. Gypsy Oil Co., (C. C. A. 8) 10 F. (2d) 487, that the Secretary is not vested with supervision of the proceeds of lands inherited by full-blood heirs.

(8) Petitioner erroneously says (brief, p. 15), that no governmental interest is directly involved in proceedings to determine heirship, "inasmuch as the restrictions on alienation do not prevent inheritance."

The government has a direct interest in such proceedings, since the judgment rendered directly affects the right of possession, and the title to restricted land. It is interested in seeing that the land be held, during the period of restrictions, for the sole use and benefit of allottees, and their lawful heirs. McKay v. Kalyton, 204 U. S. 458, 27 S. Ct. 346, 51 L. ed. 566. This has been recognized by Congress. See, Act of June 25, 1910, 36 Stat. 855, as amended by Act of March 3, 1928, 45 Stat. 161; and Act of December 24, 1942, 56 Stat. 1080, vesting the Secretary with exclusive jurisdiction to determine heirs. Congress has made many appropriations to cover expense of such determination.

It also erroneously says (brief, p. 15) that restricted property of the deceased Indian is not within the jurisdiction of the probate court. While restricted property is not subject to administration in the courts of the state, and is not subject to the payment of debts, yet, the judgment entered pursuant to Section 1 of the 1918 Act conclusively determines the title to and the right of possession of inherited lands. Hardridge v. Hardridge, 168 Okl. 7, 31 P. (2d) 597; St. John v. Thompson, 179 Okl. 240, 65 P. (2d) 442, *certiorari* denied 302 U. S. 718.

(9) Congress has not so determined. It has vested the District and County Courts of the state with identical power. The involved act confers power on the County Court, as well as the District Court, to partition inherited land. United States v. Bond, (C. C. A. 10), 108 F. (2d) 504. Section 1 of the 1918 Act vests the District Courts with power to determine heirship on appeal from the County Court, and the state statutes provide for a trial *de novo* in such appeals. 58 Okl. St. Ann., Sec. 735. See also, Section 8 of the Act of January 27, 1933, 47 Stat. 777, which authorizes an appeal to the District Court from an order approving conveyance of full-blood heir.

this reason, they assert, the United States is a necessary party to partition proceedings.

In dealing with Indian questions, it must be remembered that the power of Congress is plenary and political, and that it alone has authority to determine the time and manner of imposing, extending, or removing restrictions upon the lands of the Indian wards of the Nation. It was within the constitutional power of Congress to vest the courts of the state with jurisdiction to order and direct the partition and sale of lands inherited by restricted members of the Five Civilized Tribes. *Parker* v. *Richard*, 250 U. S. 235, 39 S. Ct. 442, 63 L. ed. 954,(10) and it was also within its power to prescribe the procedure to be followed, and to determine whether or not the United States should be made a party thereto. *Winton* v. *Amos*, 255 U. S. 373, 41 S. Ct. 342, 65 L. ed. 684.

We respectfully assert that a consideration of the act in question clearly demonstrates that it was the intention of Congress that the proceeding authorized by the act should be maintained without the government being made a party thereto.

In *Winton* v. *Amos*, *supra*, it was contended that the Government's trusteeship of the funds of Mississippi Choc-

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(10) Cohen, Handbook of Federal Indian Law (1942), p. 119, is authority for the following statement:

"In Oklahoma there has been a particularly broad devolution of powers to the state government. The organs of state government, however, in exercising such powers have been considered federal agencies. Thus, in Parker v. Richard, the Supreme Court in referring to the authority of the County Courts of Oklahoma under Section 9 of the Act of May 27, 1908, said:

" * * * That the agency which is to approve or not is a state court is not material. It is the agency selected by Congress and the authority confided to it is to be exercised in giving effect to the will of Congress in respect of a matter within its control. Thus in a practical sense the court in exercising that authority acts as a federal agency; and this is recognized by the Supreme Court of the state. Marcy v. Board of Commissioners, 45 Okl. 1."

taw Indians, and its guardianship over their allotted lands, made it necessary that the United States be made a party to proceedings instituted in the Court of Claims, under congressional authority, by the attorneys who had successfully advanced the claim of these Indians to membership in the Choctaw Nation.

The act, under which the proceedings were brought, authorized the Court of Claims to hear and determine the claims of the attorneys for services rendered and expenses incurred in behalf of the Indians and to render judgment in such amount as appeared to be equitable and just. It provided that the "judgment, if any, shall be paid from any funds now or hereafter due such Choctaws by the United States." It also provided that notice of such suit should be given to the Governor of the Choctaw Nation, and that the Attorney General should appear and defend the suit in behalf of the Indians.

In answering the contention that the United States was a necessary party to the proceedings, the court held (255 U. S. 392):

> "To the objection that the Government's trusteeship of the funds of these Indians and its guardianship over their interest in the allotted lands made it necessary that the United States should be a party to the proceedings, it is sufficient to say that the regulation of this matter is clearly within the power of Congress, and that Congress acted within that power in constituting the Governor of the Choctaw Nation the representative of the defendants upon whom notice of the suit was to be served in their behalf, and designating the Attorney General of the United States as their attorney to appear and defend the suit. * * *"

And, in *Hy-tu-tse-mil-kin* v. *Smith*, 194 U. S. 401, 24

S. Ct. 676, 48 L. ed. 1039, it was contended that the United States was a necessary party to an action for an allotment under the provisions of the Act of Congress August 15, 1894, 28 Stat. 290, which vested the Circuit Courts of the United States with jurisdiction to try and determine any action, suit or proceeding, arising in their respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to an allotment of land under any law or treaty; and which act provided that "the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him."

In answering this contention, the court held (24 S. Ct. 680):

> "In our opinion, the claim that the United States must be made a party is without foundation.
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> * * * * * * * *
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> "Under this statute there is no provision rendering it necessary, in a private litigation between two claimants for an allotment, to make the United States a party. The statute itself provides that the judgment or decree of the court, upon being properly certified to the Secretary of the Interior, is to have the same effect as if the allotment had been allowed and approved by the Secretary of the Interior. This provision assumes that an action may be maintained without the Government being made a party, and provides for the filing of a certificate of the judgment and its effect; and the Government hereby, in substance and effect, consents to be bound by the judgment, and to issue a patent in accordance therewith. * * *"

These cited cases are directly applicable and controlling in the case at bar, and afford a full answer to the peti-

tioner's contention that it was a necessary party to the partition proceedings had in this case under authority of the 1918 Act.

The petitioner asserts that the decision below conflicts with *Minnesota* v. *United States*, 305 U. S. 382, 59 S. Ct. 292, 83 L. ed. 236.(11)

The *Minnesota* case involved, in substance, the following facts:

An action was instituted by the State of Minnesota in one of its courts to condemn for highway purposes certain lands, the title to which was held by the United States, in trust, for restricted Indian allottees.

The state claimed the right to maintain such action by reason of the provisions of the Act of Congress of March 3, 1901 (25 U. S. C. A. 357), which provides:

> "That lands allotted in severalty may be condemned for any public purposes under the laws of the state or territory where located, in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

The case was removed to Federal Court by the attorney for the United States.

It was contended by the Government that the state court in the first instance, and the federal court upon removal, did not acquire jurisdiction of the condemnation proceedings, because such jurisdiction had not been specifically conferred by Congress, and because the United States was a necessary and indispensable party to the proceedings.

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(11) The government also relies upon Heckman v. United States, 224 U. S. 413; Bowling v. United States, 233 U. S. 528; Privett v. United States, 256 U. S. 201, and Sunderland v. United States, 266 U. S. 226, to sustain its position in this case. These cases are not in point. They merely hold that the United States has capacity to sue to set aside conveyances of land allotted to Indians under its care, where restrictions upon alienation have been transgressed.

In passing upon this contention, this Court held, in substances: *(1)* that the state court did not have jurisdiction of the condemnation proceedings for the reason that the language "in the manner as land owned in fee may be condemned" did not authorize a suit in the state court, but merely authorized condemnation "for any public purpose under the laws of the state or territory where located"; and, *(2)* that the United States was a necessary party to such an action, *(a)* because it held the fee title to the lands in trust for the Indian owners; *(b)* because it was interested in the amount to be paid for the lands; and, *(c)* because it was interested in the disposition of the proceeds to be derived from the condemnation of the lands, since Congress had conferred authority upon the Secretary of the Interior to reinvest such funds in the purchase of other lands in behalf of the Indian owners.

We respectfully urge that the decision in the *Minnesota* case is clearly distinguishable from the present case, and has no persuasive effect in the construction of the involved enactment, for the reasons, as follows:

(1) The 1918 Act, unlike the statute involved in the *Minnesota* case, specifically confers jurisdiction upon the state courts to remove restrictions upon land acquired by full-blood Indians by inheritance or devise by the sale of such lands in partition. *Salmon* v. *Johnson*, 78 Okl. 182, 189 Pac. 537; *United States* v. *Bond* (C. C. A. 10), 108 F. (2d) 504.[12]

(2) The 1918 Act, unlike the enactment involved in the *Minnesota* case, adopts the statutes of the State of Oklahoma providing for appraisement and sale of lands where parti-

(12) Cf.: S. Rep. No. 330, 65th Congress, 2nd Session; Cohen, Handbook of Federal Indian Law (1942), pp. 379 (footnote 178) and 446.

tion in kind cannot be had, to define the procedure to be followed in the sale in partition of lands inherited by full-blood members of these tribes.

It must be assumed that Congress was cognizant with these statutory provisions, and knew that the right to partition was absolute *(Erwin* v. *Hines,* 190 Okl. 99, 121 P. (2d) 612). It also knew that partition in kind would be made whenever possible without manifest injury to the parties, but in the event partition in kind could not be made, the land would be appraised by commissioners appointed by the court (Title 12, Okla. Stat. Ann. 1509); and in the event no party elected to take at the appraised value, or in the event more than one elected to take at such value, the lands would be sold at sheriff's sale to the highest bidder, and that such sale could not be made for less than two-thirds of the appraised value (Title 12, Okla. Stat. Ann. 1512-1513).

It must be conceded that it was within the plenary power of Congress to determine what safe-guards, if any, would be provided for the protection of the full-blood heir. And by the adoption of these provisions, it provided a safe-guard for the protection of the Indian similar to that provided by the first proviso of Section 9 of the Act of May 27, 1908, which requires the conveyance of a full-blood heir to be approved by the appropriate county court of the state. The sole purpose of this requirement is to see that the Indian shall not be wronged by any sale he might desire to make; that the consideration which be receives is ample; and, that he shall, in fact, receive it. *Lykins* v. *McGrath,* 184 U. S. 169, 22 S. Ct. 450, 46 L. ed. 485; *Kiker* v. *United States,* (C. C. A. 10) 63 F. (2d) 957.

(3) The Secretary of the Interior was granted supervision of the funds to be derived from the proceedings involved in the *Minnesota* case, while no such provision has

been made by Congress for such supervision of the proceeds to be derived from the sale of inherited and devised lands of full-blood members of the Five Civilized Tribes, either under the 1918 Act, or under any other enactment relating to these tribes.

As we have heretofore shown, the proviso of Section 9 of the 1908 Act relaxed restrictions, so as to permit the full-blood heir to convey, and required approval by the appropriate county court for the sole purpose of safe-guarding his interests; and the purpose of the amendatory Act of April 12, 1926, was to provide the same safe-guards in behalf of full-blood devisees. This provision was further amended by Section 8 of the Act of January 27, 1933, 47 Stat. 777, to require the approval of such conveyances to be made in open court, in the manner provided by the rules promulgated by the Supreme Court of the State of Oklahoma, in June, 1914, governing procedure in probate matters.

Rule 10 of the probate rules,[13] in addition to defining the procedure for obtaining such approval, provides as follows:

> "When it shall appear for the best interest of the Indian, approval will be withheld unless the grantor agrees, in writing, for the deposit of the proceeds derived from the sale of the land to be expended, subject to the approval of the County Court."

This is the first expression of Congress placing any restriction upon the custody or supervision of funds to be derived from the sale of lands acquired by inheritance or devise by full-blood members of these tribes; and it negatives any claims that either the Secretary of the Interior,

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(13) Rule 10 is set forth in full in In re Ashshalintubbi, 178 Okl. 582, 63 P. (2d) 724. For convenience it is set forth in an appendix to this brief.

or the Superintendent of the Five Civilized Tribes, was entitled to the custody and control of the proceeds to be derived from the sale of such lands. It constitutes an affirmative recognition by Congress that the proceeds of such sales had not theretofore been restricted in any manner.

In addition, the 1918 Act provides that any land allotted in partition proceedings to a full-blood Indian, or conveyed to him upon an election to take at the appraised value, shall remain subject to all restrictions upon alienation obtaining prior to such partition. These restrictions are the same restrictions as are provided by Section 9 of the 1908 Act, as amended by the Act of April 12, 1926; and, following partition, the heir or devisee could sell the lands apportioned to him, or acquired upon election to take at the appraised value, with the approval of the appropriate county court.

We respectfully assert that since Congress made provision for continuing restrictions upon the lands in the event they were allotted to the full-blood Indian by partition in kind, or acquired by him upon an election to take at the appraised value, and at the same time made no provision for restricting the proceeds to be derived by him in case the land was sold, that it did not intend that the proceeds from such sale should be subject to any restriction whatsoever.(14)

It is significant to note that the decision in the *Minnesota* case, holding the proceeds to be derived from the sale of the lands in the condemnation proceedings therein involved, to be restricted, was based upon the fact that the restrictions upon the alienation of such lands, and the proceeds to be derived therefrom, were extended by the Indian Reorganization Act of June 18, 1934, 48 Stat. 984.

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(14) Cf.: Cohen, Handbook of Federal Indian Law (1942), page 446.

In this connection, we call attention to the fact that the Five Civilized Tribes were expressly exempted from the operation of that act; and the Oklahoma Welfare Act of June 26, 1936, 49 Stat. 1967 (5 F. C. A., Title 25, Section 451, *et seq.)*, contains no such provision.

It is also significant to note that the decision in the *Minnesota* case was entered on January 3, 1939, and the decision of the Circuit Court for the Tenth Circuit in *United States* v. *Bond*, 108 F. (2d) 504, *supra*, was not entered until December 26, 1939, and yet the Government made no effort in the latter case to apply the rule announced in the *Minnesota* case to the partition proceedings which formed the basis of that case.

The petitioner asserts (Br., p. 8) that the United States was interested in the partition proceedings "in effectuating the authority of the Secretary of the Interior under the Act of June 30, 1932, 47 Stat. 474 (25 U. S. C., Sec. 409a),(15)

(15) The act does not, expressly or by implication, impose restrictions upon the proceeds of partition sales. It merely authorizes the Secretary to invest the proceeds derived from the sale of restricted, tax-exempt land "in other lands selected by the Indian." The Secretary may make the purchase, at the Indian's request, even though the proceeds are not restricted. See Sec. 5, Act of June 18, 1934, 48 Stat. 985 (25 F. C. A., Sec. 465), and Sec. 1, Act of June 26, 1936, 49 Stat. 1967 (25 F. C. A., Sec. 501), which authorizes the Secretary to acquire lands for Indians by purchase, relinquishment, gift, exchange or assignment. Cf.: Board Com'rs Pawnee County, Pawnee County, v. United States, (C. C. A. 10) 139 F. (2d) 248.

The 1932 Act provides that the land so purchased "shall be restricted * * * and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable land from which the reinvested proceeds were derived, * * *." It is evident that such purchased land could be conveyed by the Indian, with the approval of the County Court. It could also be partitioned under the act in question.

If such act applies to proceeds derived from partition, it would also apply to the proceeds of a voluntary alienation under the provisions of Section 9 of the 1908 Act, as amended by the 1926 and 1933 statutes. That Congress did not so intend is shown by the language of Rule 10, *supra*, which vests the County Court with supervision and control of such funds. This negatives any control on the part of the Secretary. Cf.: United States v. Gypsy Oil Co., (C. C. A. 8) 10[illegible] (2d) 487, holding the proceeds of such lands to be free from the Secretary's control.

to determine that the proceeds shall be reinvested in other lands correspondingly tax-exempt and restricted," and "in making it possible for the Secretary of the Interior to exercise his preferential right to purchase the land at the sale, under the Act of June 26, 1936, Sec. 2, 49 Stat. 1967."

It must be presumed that Congress was cognizant with the provisions of the 1918 Act when it adopted the later acts, and if it had intended that the Secretary be given notice of the pendency of the partition proceedings, it would have so provided in these acts. Neither of the acts, relied upon by petitioner, contains any express revocation of the power conferred by the 1918 Act, nor any provision inconsistent with its continued exercise by the state courts. Had there been a purpose to modify or alter the terms of the 1918 Act, it is but reasonable to believe that words applicably expressing that purpose would have been used. The matter would not have been left to conjecture or uncertain implication.

The petitioner also contends that the decision below should be reversed for the reason, in substance, that while it is now the customary practice to give notice of the pendency of partition proceedings in the manner provided by Section 3 of the Act of Congress of April 12, 1926, yet, that litigants will not continue to follow this practice if this decision is permitted to stand.

It is to be observed that the language of Section 3 of the 1926 Act, authorizing the service of such a notice, is neither directory nor mandatory. It is merely permissive, and it was so held by the Circuit Court for the Tenth Circuit in *Ceasar* v. *Burgess,* 103 F. (2d) 503. It is for Congress alone to determine whether or not notice of such proceedings should be given to the United States, and this Court should not rewrite the 1926 Act, or expand its clear terms to meet

the objection of petitioner. Cf. *Choctaw Nation* v. *United States,* 318 U. S. 423, 63 S. Ct. 672, 678, 87 L. ed. 877.

We respectfully assert that the District Court of Creek County, Oklahoma, was vested with jurisdiction of the partition proceedings which form the basis of this action, and that it was authorized to proceed to judgment and decree, without the service of any notice upon the United States, subject only to the right of the United States to relitigate the issues, if the judgment rendered in its absence was erroneous as a matter of fact or of law. *United States* v. *Candalaria,* 271 U. S. 432, 444, 46 S. Ct. 561, 70 L. ed. 1023.

The Government, however, conceded that these partition proceedings were conducted in strict conformity with the statutes of the state (R. 18). It does not here attempt to relitigate the issues, but confines its assault upon such proceedings solely to its contention that the state court was without jurisdiction in the premises.

As we have heretofore shown, the act in question has received the consideration of the courts in many cases, and it has never been indicated or suggested, until the present case, that the United States was a necessary party to such proceedings.

We call attention to the fact that the decision of the Supreme Court of Oklahoma in *Salmon* v. *Johnson,* 78 Okl. 182, 189 Pac. 537, was entered on April 26, 1920. It was therein expressly held that the purpose of the act was to confer jurisdiction on the courts of the State of Oklahoma to partition inherited lands of full-blood members of these tribes.

The rule announced in that case has been followed without departure by the federal courts, as well as by the courts

of the State of Oklahoma. It has governed the transfers of real estate for nearly a quarter of a century, and become a rule of property. This construction should not be overturned, even though such construction were open to doubt. *Truskett* v. *Closser,* 236 U. S. 223, 35 S. Ct. 385, 387, 59 L. ed. 549; *United States* v. *Lee,* (C. C. A. 10) 108 F. (2d) 936.

The petitioner seeks to avoid the force of the last cited cases by its statement, in substance, that no substantial number of titles will be affected by the decision in this case.

This statement is based, in part, upon the claim that the applicable statute of limitations of the State of Oklahoma, made available by Section 2 of the 1926 Act, affords an absolute bar to any attack upon partition proceedings had prior to the effective date of the Act of April 12, 1926, (Br., p. 5).

A consideration of the decisions of the Supreme Court of the state, construing the applicable statute of limitations (12 Okla. Stat. Ann., Sec. 93), clearly shows that they fail to sustain petitioner's claim. The statute of limitations is not set in motion by the entry of the decree in partition, or by the recording of the sheriff's deed. It is available as a defense only where the land has been held under adverse possession for 15 years, and title has thus been acquired by prescription. In order for possession to be adverse, within the meaning of the statute, it must be open, visible, continuous, exclusive, and of such a nature as will notify persons seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but against all titles or claims; and proof of such possession must be established by clear and positive proof. *Reinhart* v. *Missouri-Kansas-Texas R. Co.,* 187 Okl. 661, 105 P. (2d) 541.

It is apparent that a consideration of the statute of limitations lends no aid in determining the number of titles which will be affected by the decision in this case. This is especially true, since a large part of that portion of Eastern Oklahoma, which comprises the lands of the Five Civilized Tribes, consists of open and unoccupied land. The bar of the statute of limitations is not available to one claiming land of that class through partition proceedings, irrespective of the time which has elapsed since the date of such proceedings.

The petitioner's estimate of the number of titles which will be affected by the judgment in this case, is also based, in part, upon the report of the Superintendent of the Five Civilized Tribes, showing the number of notices which have been served on him, under authority of the 1926 Act.

In this connection, we call attention to the fact, that although few notices were served upon the Superintendent prior to the year 1933, yet that since that time, it has been the customary practice of careful lawyers to serve the Superintendent with notice of the pendency of all actions and proceedings to which an Indian is a party, whether or not any question of restrictions is involved. It has also been the customary practice for the United States to remove to the federal court, all actions where notice is served, and where the rights of a restricted Indian is involved. A more accurate estimate could be obtained by a consideration of the number of cases removed to federal court, than can be had by a consideration of the report of the Superintendent of the Five Civilized Tribes.

Conclusion.

We respectfully assert that the District Court of Creek County, Oklahoma, was vested with jurisdiction to order and direct the partition and sale of the lands which form the basis of this case, without the Government being made a party to such proceedings; and that the decision of the Honorable Circuit Court of Appeals for the Tenth Circuit, in so holding, should be in all matters approved and affirmed.

Respectfully submitted,

GEORGE H. JENNINGS,
Sapulpa, Oklahoma,
Counsel for Respondent.

APPENDIX A.

Rule 10 of the Rules of Procedure in Probate Matters, adopted by the Supreme Court of Oklahoma, in June, 1914, is as follows:

"Deeds conveying inherited lands of full-blood Indian heirs shall be approved only on the verified petitions of grantors which shall set forth the names of the parties, description of the land, roll number of the decedent and grantors and quantum of blood, the permanent residence of the deceased allottee at the time of death, and the character and extent of the interest sold. Said petitions shall be set down for hearing not less than ten (10) days from the date of filing and on one of the two days hereinbefore provided for the confirmation of sale by guardian, advertised in the county where the land is located for one week, and probate attorney or local counsel for the tribe of which the grant-

or is a member shall be notified upon the filing of the petition. Said land shall be appraised, and testimony of disinterested parties may be required as to the value of the land conveyed, when deemed necessary by the Court. The grantors shall be present, and be examined in open court and before such deeds shall be approved, and the Court must be satisfied that the consideration has been paid in full in the presence of the Court. No petition will be considered when any deed has been previously placed of record upon the land, or taken within thirty (30) days after the death of the allottee. The evidence shall be transcribed by the stenographer and filed of record, in the case, the expense of which, including attorney's fees, must be borne by the grantee. When it shall appear for the best interest of the Indian, approval will be withheld unless the grantor agrees in writing for the deposit of the proceeds derived from the sale of the land, to be expended subject to the approval of the County Court."

SUPREME COURT OF THE UNITED STATES.

No. 648.—October Term, 1943.

The United States of America, Petitioner, *vs.* D. B. Hellard.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[May 15, 1944.]

Mr. Justice Douglas delivered the opinion of the Court.

The question in this case is whether full-blood Indians of the Five Civilized Tribes may be divested of title to restricted land by a sale in partition proceedings to which the United States is not a party.

A full-blood Creek Indian died leaving heirs of the full blood. They inherited certain lands from her, lands which were subject to restrictions on alienation both in her hands and in the hands of the heirs.[1] By § 2 of the Act of June 14, 1918 (25 U. S. C. § 355, 40 Stat. 606) Congress declared that such lands were "made subject to the laws of the State of Oklahoma, providing for the partition of real estate."[2] By § 3 of the Act of April 12, 1926 (44 Stat. 239) Congress provided for the service upon the Superintendent for the Five Civilized Tribes of a prescribed, written

[1] 35 Stat. 312; 44 Stat. 239; 45 Stat. 495; 47 Stat. 777. And see Parker v. Richard, 250 U. S. 235; Harris v. Bell, 254 U. S. 103; Stewart v. Keyes, 295 U. S. 403.

[2] "That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character."

Sec. 1 of this Act (25 U. S. C. § 375) provides in part: "That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said State for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question."

notice of the pendency of any suit to which a restricted member of the Tribes in Oklahoma or the restricted heirs or grantees are parties and which involves claims to "lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same." By that Act the United States is given an opportunity to appear in the cause and is bound by the judgment which is entered.

The heirs instituted partition proceedings in the District Court for Creek County, Oklahoma in March 1940. The United States was not named as a party nor was notice of the suit served on the Superintendent. A judgment of partition was entered, pursuant to which the land was sold and a sheriff's deed in partition issued to respondent. In 1941 respondent instituted in the same court the present action against the Indian heirs to quiet his title. Notice was served on the Superintendent. The heirs answered disclaiming any interest. At the instance of the United States the cause was removed to the federal District Court as authorized by § 3 of the Act of April 12, 1926. The United States then answered, alleging that the partition proceedings were void for lack of the United States as a party and for want of service on the Superintendent under § 3 of the Act of April 12, 1926. It prayed that the deed in partition be set aside and title quieted in the heirs. The District Court held that the partition proceedings were valid and quieted title in respondent. The Circuit Court of Appeals affirmed. 138 F. 2d 985. The case is here on a petition for a writ of certiorari which we granted because of the importance in the administration of Indian affairs of the question presented.

It seems clear from the language of the Act of June 14, 1918 and its legislative history (S. Rep. No. 330, 65th Cong., 2d Sess.) that Congress vested in the Oklahoma state courts jurisdiction to determine heirship in these restricted lands (§1) and jurisdiction to partition them. § 2. See *Salmon* v. *Johnson*, 78 Okl. 182; *United States* v. *Bond*, 108 F. 2d 504. The authority of Congress to select state tribunals to perform such functions is clear. *Parker* v. *Richard*, 250 U. S. 235; *Harris* v. *Bell*, 254 U. S. 103; *Stewart* v. *Keyes*, 295 U. S. 403. But a grant of jurisdiction to a particular court without more does not determine what parties are indispensable to the proceedings in question. Petitioner concedes that

the United States is not a necessary party to proceedings to determine heirship under § 1 of the Act of June 14, 1918. Since restrictions on alienation do not prevent inheritance, no governmental interest is at least directly involved in such a determination. It may likewise be inferred from the language, nature, and purpose of Acts of Congress which vest jurisdiction over specified Indian affairs in a designated court that Congress not only has made that tribunal the exclusive agency to effectuate the federal policy but also has dispensed with any requirement that the United States be a party to the proceedings. See *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401, 413-414; *Winton* v. *Amos*, 255 U. S. 373, 392. But we do not think that Congress did more by those provisions of the Act of June 14, 1918 with which we are presently concerned than to grant the Oklahoma state courts jurisdiction over partition proceedings.

Restricted Indian land is property in which the United States has an interest. "This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust." *Heckman* v. *United States*, 224 U. S. 413, 437. Though the Indian's interest is alienated by judicial decree, the United States may sue to cancel the judgment and set the conveyance aside where it was not a party to the action. *Bowling & Miami Investment Co.* v. *United States*, 233 U. S. 528; *Privett* v. *United States*, 256 U. S. 201; *Sunderland* v. *United States*, 266 U. S. 226. Under § 2 of the Act of June 14, 1918 lands partitioned in kind to full-bloods remain restricted. Only if the land is sold at partition sale are the restrictions removed. The governmental interest throughout the partition proceedings is as clear as it would be if the fee were in the United States. *Minnesota* v. *United States*, 305 U. S. 382, 387-388; *Town of Okemah* v. *United States*, 140 F. 2d 963. The United States as guardian of the Indians is necessarily interested either in obtaining partition in kind where that course conforms to its policy of preserving restricted land for the Indians or in seeing that the best possible price is obtained where a sale is desirable. Where, as here, the lands are both tax-exempt and restricted, the United States is concerned with the reinvestment of the proceeds in other lands likewise tax-exempt and restricted as provided in the Act

of June 30, 1932, 47 Stat. 474, 25 U. S. C. § 409a.[3] The United States is also interested in protecting the preferential right of the Secretary of the Interior to purchase the land at the sale for another Indian as provided in § 2 of the Act of June 26, 1936, 49 Stat. 1967.[4] These are important governmental interests. Since the power of Congress over Indian affairs is plenary, it may waive or withdraw these duties of guardianship or entrust them to such agency—state or federal—as it chooses. But we do not find any indication that when Congress came to deal with these partition proceedings it substituted the Oklahoma state court for the Secretary of the Interior in the performance of the functions which we have enumerated. That alone would not be fatal to respondent's position if it could be inferred that those governmental interests were to be protected by means other than making the United States a party. But, as we have said, the Act in question purports to be no more than a jurisdictional statute. It fails to say that the United States is not a necessary party; nor does it suggest that the United States or its officers are confined to a limited role in the proceedings. Cf. *United States* v. *Candelaria*, 271 U. S. 432, 444. We must read the Act in light of the history of restricted lands. That history shows that the United States has long been considered a necessary party to such proceedings in view of the large governmental interests which are at stake. We will not infer from a mere grant of jurisdiction to a state or federal court to adjudicate claims to restricted lands and to order

[3] "That whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance."

[4] "Whenever any restricted Indian land or interests in land, other than sales or leases of oil, gas, or other minerals therein, are offered for sale, pursuant to the terms of this or any other Act of Congress, the Secretary of the Interior shall have a preference right, in his discretion, to purchase the same for or in behalf of any other Indian or Indians of the same or any other tribe, at a fair valuation to be fixed by the appraisement satisfactory to the Indian owner or owners, or if offered for sale at auction said Secretary shall have a preference right, in his discretion, to purchase the same for or in behalf of any other Indian or Indians by meeting the highest bid otherwise offered therefor."

their sale or other distribution that Congress dispensed with that long-standing requirement. The purpose to effectuate such a major change in policy must be clear.

Much stress is laid on the point that if § 2 of the Act of June 14, 1918 is so construed, it was meaningless until the Act of April 12, 1926 was passed which provided a statutory method for making the United States a party. The argument is that prior to the latter Act there was no way of joining the United States as a party to such an action. But as stated by Mr. Justice Brandeis speaking for the Court in *Minnesota* v. *United States*, *supra*, p. 388, authorization to bring an action involving restricted lands "confers by implication permission to sue the United States."[5] The suit in that case failed because no jurisdiction was granted to the state courts to condemn the lands in question.[6] But since the state court in the present case was given jurisdiction to partition, consent to be sued in the state court may be implied. Service of process therefore might be had in the usual way (see *Town of Okemah* v. *United States*, *supra*, p. 966) even in absence of the 1926 Act.

Reversed.

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[5] And see United States v. Jones, 109 U. S. 513, 519-521.

[6] See Cohen, Handbook of Federal Indian Law (1942), p. 381.